76-1864

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75 - 1750

SAVE OUR WETLANDS, INC. (SOWL) BY MARY HALPIN, PRESIDENT AND FRANCOIS JELALIAN,

Plaintiffs-Appellants

versus

UNITED STATES ARMY CORPS OF ENGINEERS, AND ITS OFFICERS AND EMPLOYEES, THE ST. TAMMANY POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, LEISURE, INC., BRADLEY MC DONALD CORPORATION, THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT THROUGH THEIR NAMED ADMINISTRATORS,

Defendants-Appellees

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CITATIONS

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SAVE OUR WETLANDS, INC. (SOWL) BY MARY HALPIN, PRESIDENT AND FRANCOIS JELALIAN,

Plaintiffs-Appellants

VERSUS

UNITED STATES ARMY CORPS OF ENGINEERS, AND ITS OFFICERS AND EMPLOYEES, THE ST. TAMMANY POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, LEISURE, INC., BRADLEY MCDONALD CORPORATION, THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT THROUGH THEIR NAMED ADMINISTRATORS,

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Plaintiffs-Appellants

The petitioners above mentioned respectfully pray that a writ of certiori issued to review a judgment of the United States Court of Appeals for the Fifth Circuit entered herein in on April 4, 1977.

OPINIONS

The opinion of the Court of Appeal is reported at _____ F. 2d. 2414 (April 4, 1977).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 4, 1977. On May 1977 a petition for a re-hearing en banc was denied by the Fifth Circuit Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 [1].

QUESTIONS PRESENTED

1. Whether in an environmental case involving the destruction of a vast wetlands estuary for the purpose of building

a residential subdivision, laches is properly applied to deny all relief when the decree could be molded to protect the public against serious losses by requiring the preparation of an environmental impact statement.

2. Whether the application of laches is appropriate where admitted violations of Federal Criminal laws have been committed by those invoking the doctrine of laches.

STATEMENT OF THE CASE

The area in question, an integral part of the MPCB ecosystem (which are the system of estuaries formed by Lakes Maurepas, Ponchartrain, Catherine and Borgne) is a vast but delicate wetlands estuary abundant with all forms of fish fowl and animal life, shown as seamarsh on the state land office maps of 1852 and 1857. Both before and after the

illegal actions in approximately 1929 of the local county governing body that was extablished as a drainage district, which commenced to sell bonds for the purpose of draining the estuary for development, the area was subject to the ebb and flow of the tide of Lake Pontchartrain so that the damming and diking of this area was damming and diking of a navigable body of water; however, during the 1930's, the drainage district went bankrupt and the land which had already been illegally drained reverted to its natural state, again subject to the ebb and flow of the tide of the navigable body of water known as Lake Pontchartrain. In the early 1960's, the drainage district was revived and the area drained again in violation of a federal criminal statute, The Refuse Act of 1899, 33 U.S.C. Section 407, but the area was again flooded, and again reverted

to its natural state subject to the ebb and flow of the tide. In the early 1970's, a development corporation by the name of Leisure, Inc. commenced repair of the illegal dike and levy system created by St. Tammany Parish Drainage District and dug an interior canal system still without obtaining a Section 10 permit under the Rivers and Harbors Act of 1899. No permit was obtained prior to the original diking and damming in the 1920's, nor in the early 1960's, nor in the 1970's residential development. No public hearings were ever held and no environmental impact statement was ever prepared. In early 1972, an application was finally made by Leisure, Inc. for a permit on the western portion of Eden Isles. (The Eden Isles development is divided by Interstate 10 into the portion of the Eden Isles East and Eden Isles West. The

development referred to in this case is only on the western portion. Only levee repair work has been done on the eastern portion, which would revert to its natural state if this repair work was halted.

During the period between the time that the permit was applied for and issued, the EPA recommended to the Corps of Engineers that an Environmental Impact statement should be required for this project. The U. S. Fish & Wildlife Service objected to an issuance of the permit on the basis that the Interior canal system had not been included in the application. After the dredging had been substantially completed in March of

1973, the Corps of Engineers issued a retroactive Section 10 permit to the developer excluding the eastern portion and excluding the interior canal system, but no public hearings were ever held and no environmental impact statement was ever prepared. Approximately one year after, upon learning that none of the requirements of the National Environmental Policy Act and other Federal laws had been complied with, plaintiff petitioners filed a lawsuit in District Court asking inter alia that any further work be enjoined pending the preparation of an environmental impact statement. The matter was referred to U. S. Magistrate Sear, as Special Master, who rules, without reaching the merits that the cause be dismissed on the grounds of laches.

Basis for the decision to apply

laches was primarily that the developer had spent $26,000,000.00 in advertising and developing the area for residential development, diking, damming, and dredging of this navigable body of water had been substantially completed, there were already fifty families living in the development, and the large cranes used to create the residential development had been visible and apparent from the beginning of the project. Accordingly, in spite of the fact that the public had not been properly notified, no public hearings were held, comments from the U. S. Wildlife Service and the Environmental Protection Agency were ignored, and no environmental impact statement was prepared, it was concluded that it would be unfair to the developers to be required to return the area to its natural state or even to postpone further

construction pending preparation of an environmental impact statement even though the developers testified and the Court found that no further dredging, diking and damming was planned.

REASONS FOR GRANTING THE WRIT

The use of laches in this particular set of circumstances is particularly troublesome because while some court circuits have held that laches is appropriate in environmental cases, there is considerable dispute among the circuits with regard to when, how, and even if laches should in fact ever be used in environmental cases such as this one.

There is no question that the area was a vast wetlands estuary subject to the ebb and flow of Lake Pontchartrain and thus was subject to the National Environmental Policy Act. Biologists for the State of Louisiana and the U. S. Fish

and Wildlife Service, called as experts by the plaintiff presented uncontroverted evidence that substantial environmental damage had already been caused by destroying this vast wetlands estuary, that the loss of fish breeding grounds alone over a relatively short period of time would far exceed the amount of money already spent by the developers in this project, that this development would eventually cause considerable damage to the fish and wildlife in the navigable body of water, namely Lake Pontchartrain, and that there would be severe environmental effects from an anaerobic and septic conditions within the interior canal system in the residential development itself which would cause health and physical problems for the individuals living therein. The representative of the U. S. Fish and Wildlife Service further testified that

conditions had become so grave in Florida that the Corps was requiring that canals be filled in order to prevent further harmful effects. The environmental investigation prepared by Burke & Associates for William J. Guste, Jr., Attorney General of the State of Louisiana has specified in detail that fish kills are already being reported and that increasingly deleterious effects are anticipated as the residential development grows in size. This investigative report has also listed a number of alternatives which could be employed to avert these public health and environmental dangers far short of requiring that the project be returned to its natural state. Additionally, evidence submitted by the defendant show that at the time of the hearing, the only parts of the project which had not been completed as far as the developers

were concerned were the paving of streets and the building of bulkheads. One of the recommendations contained in the environmental investigation by Burke & Associates for the Attorney General of Louisiana was that by not building the bulkheads and allowing the canals to reach their natural level with its natural plant growth, the anaerobic and septic conditions might very well be completely averted without any other measures needed to be taken other than proper disposal of sanitation.

Additionally, at the time of the hearing, only fifty houses had been built out of thirteen to fourteen hundred lots so that more than ninety-five percent of the residential building had yet to be commenced. Therefore, without an environmental impact statement, these people will undoubtedly spend millions of dollars in construction of their residences without

the assurance of an environmental impact statement the National Environmental Policy Act is designed to provide.

This decision of the Fifth Circuit is in direct conflict with decisions of other circuits.

CONFLICT OF CIRCUITS

The Sixth Circuit in the case of The Environmental Defense Fund vs. the Tennessee Valley Authority, 468 F. 2d 1164, 1972 said "Even if they segmented analysis should be employed, we would conclude that the only significant "stage" of construction is that which directly causes the significant environmental effects anticipated by the project planners. Until that stage is completed, governmental officials charged with making the ultimate decisions regarding the future of the project are entitled to comprehensive, objective

information concerning all of the benefits and costs before they decide to give final approval." Until a substantial percentage of the homes in the Eden Isles Project have been built, the final "stage" has not been reached.

The Fourth Circuit in the case of Arlington Coalitition and Transportation vs. Volpe, 458 F. 2d 1323, Cert. Den. 93 S. Ct. 312, 409 U. S. 1000, 34 L. Ed. 2d 261, also took a position different than the Fifth Circuit in this case: "Nevertheless we declined to envoke laches against the appellants because of the public interest status accorded ecology preservation by Congress. We believe that Arlington I-66 is not progressed to the point where the cost of altering or abandoning proposed route would certainly outweigh the benefits that might accrue therefrom to the general public." Certainly, protection of those individuals who have not built their home, whose investment at a conservative average figure of $50,000 per home would exceed $64,000.000.00, more than twice the present investment of the developers would seem to be more than sufficient to question whether prejudice to the developers would be outweighed by the ultimate prejudice to the consuming public who has bought a lot and plans to build in this development.

The second Circuit in the case of I-291 Why? Association vs. Burns, 517 F. 2d 1077, 1975 took an even stronger position against the use of laches: "We agree with that analysis in balancing of considerations and with the conslusion that absent a showing a great progress during the alleged delay and in view of the non public nature of the noise and air quality studies which squarely indicated the inadequacy of the EIS in respect to these elements, laches is not a bar to this suit."

And in the case of Steubing vs. Brinegar, 511 F. 2d 489, 1975, the Second Circuit said "To be sure, plaintiffs could have brought this suit earlier and thus reduced to some degree the cost which the state, the Federal Government and even private parties may incur as a result of delay pending preparation of an environmental impact statement. But we do not believe that any delay attributed here to the plaintiff should bar injunctive relief. Plaintiffs are attempting to effect compliance by public officials with duties imposed by Congress under N.E.P.A. Given the strong public interest in effecting such compliance, the primary question is not how much earlier plaintiffs should have sued, but whether injunctive relief pending compliance would still serve the public interest and the purposes of the Act."

Petitioners believe that the indication of environmental damage to the Lake Pontchartrain, its sister lakes and their estuaries shown already to exist by the Attorney General of Louisiana's investigative report by Burke & Associates and the extreme health hazards certain to be incurred by the anarobic and septic conditions of the deadended interior canal system with bulkhead sides and unnatural depths as shown by the report of the Florida Canal System more than outweigh any alterations in the project which might be occasioned by the preparation of an environmental impact statement at this time.

Accordingly, petitioners pray that this matter be remanded to the trial court to order a preliminary injunction pending preparation of a commulative environmental statement.

Respectfully submitted,

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C E R T I F I C A T E

I, PLAUCHE F. VILLERE, JR., Attorney for Plaintiffs-Appellants, and a member of the Bar of the United States Supreme Court do hereby certify that on this _____ day of May, 1977, I served copies of the foregoing petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit on the attorneys of record for defendants-appellees.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL — CIVIL ACTION

VERSUS — NO. 74-2919

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL — SECTION "H"

SPECIAL MASTER'S REPORT AND RECOMMENDATION

Pursuant to the Order of Reference of Honorable R. Blake West, United States District Judge, dated November 5, 1974, hearings were held November 14, 15,18,21,22,25 and 26, 1974.

The Parties

On October 29, 1974, SAVE OUR WETLANDS, INC. (hereinafter SOWL) and FRANCOIS JELALIAN "[o]n their own behalf and on behalf of all those people whose beneficial rights and interests in subaqueous lands, tidal marshes, tidal waters and related natural resources are being irreparably diminished, permanently damaged and destroyed by indiscriminate dredging and filling and other deleterious activities in and

around the North Shores of Lake Pontchartrain, St. Tammany Parish, Lakes Maurepas, Pontchartrain, Catherine and Borgne (MPCB) eco system; and on behalf of all those peopled who are entitled to the full benefit, use and enjoyment of their environment free from damage caused by the failure of certain Federal, State and local government agencies to prohibit the filling, dredging and other activities adversely affecting the subaqueous lands, tidal marshes, tidal waters and related natur ł resources of the Lakes Maurepas, Pontchartrain, Catherine and Borgne (MPCB) ecosystem; and on behalf of all those entitled to the full benefit, use and enjoyment of the unique natural resources of the United States and the Lakes Maurepas, Pontchartrain, Catherine and Borgne eco-system in which plaintiffs reside; and on behalf of all those similarly situated" filed a forty-nine page complaint for "Declaratory and Injunctive Relief and for Damages" against thirty-seven defendants.

PLAINTIFFS allege that they represent a broad class of people, and included as plaintiffs are "Rangia cuneata (clam), Acartia Tonsa (copepod) Rhithropanopeus Harrisii (crab), Anchoa mitchilli (bay anchovy), Brevoortia patronus (Gulf menhaden), Micropogon undulatus (silver perch), Cynoscion arenarius (san seatrout), Arius felis (sea catfish), Menidia berylina (silverside), Leiotomus xanthrus (spot), Pogonias cromis (black drum), Archosargus probatocephalus (sheepshead), Cynoscion nebulosus (speckled trout), Paralichtys Lethostigma (southern flounder), and Sciaenops ocellata (red fish)." Plaintiffs also bring this action "on behalf of their brother-plaintiffs of the sea, bayous, marshes, cane reeds,

minnow ponds, and potholes," and allege "[t]hese plaintiffs are the alligator gars, green trout, perch, sac a lait, Louisiana bull frogs, mullet, crabs, shrimp, flounder, red fish, speckle trout, croakers, drums, jack fish, sheepshead, white trout. These plaintiffs are the creatures of the air, wild white egrets, poule d'eau, dos-gris, canvasback, pentails, French duck, American Goldeneyes, Buffleheads. And on behalf of the scavangers of the soaky marshes, the nutria and muskrats. And on behalf of the endangered species, American Osprey, Southern Bald Eagle, greater sandbill crane and American Alligator."

Defendants include the UNITED STATES ARMY CORPS OF ENGINEERS (hereinafter CORPS); two unknown agents of the CORPS; seven CORPS officers individually and in their official capacities; general counsel and the Chief and District Chief of Construction operations of the CORPS; the SECRETARY OF THE ARMY, the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and the REGIONAL ADMINISTRATOR; the SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAND DEVELOPMENT and the ADMINISTRATOR, all in their individual and official capacities; the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: ST. TAMMANY PARISH, LOUISIANA, POLICE JURY (hereinafter POLICE JURY), as the governing body of the PARISH and of DRAINAGE DISTRICT NO. 2; the eleven members of the POLICE JURY; the DISTRICT ATTORNEY andhis assistant, both individually and in their official capacities, and four business corporations: BRADLEY-McDONALD CORPORATION (hereinafter BRADLEY-McDONALY); LEISURE, INC. (hereinafter LEISURE); FIRST FIDELITY MORTGAGE COMPANY (hereinafter FIRST FIDELITY), and PALOMAR FINANCIAL BOUND, also known as PÁLOMAR FINANCIAL, INC.

(hereinafter PALOMAR).

With their complaint, plaintiffs filed with the Clerk of Court 396 exhibits, including a photographic slide projector. None of the exhibits was served on any named defendant.

Thirty-seven pages of interrogatories were filed with the complaint addressed in varing numbers to various defendants.

Jurisdiction

Jurisdiction is alleged to arise under:

1) 28 U.S.C. § 1343 (3) and (4).

2) 42 U.S.C. 1983.

3) 28 U.S.C. 1337

4) Article VI, Section 2 of the United States Constitution.

5) The Fifth, Ninth and Fourteenth Amendments.

6) The National Environmental Policy Act of 1969 (hereinafter NEPA), 42 U.S.C. 4331, et seq.

7) Article I, Section 8 of the Constitution.

8) The Fish and Wildlife Coordination Act, 16 U.S.C. 661, et seq.

9) The Rivers and Harbors Act of 1899, 33 U.S.C. 403.

10) The Refuse Act of 1899, 33 U.S.C. 407

11) 28 U.S.C. 1361.

12) The Interstate Land Sales Act, 15 U.S.C. 1701.

13) The Administrative Procedure Act, 5 U.S.C. 702(a).

14) Executive Order No. 11514, 35 Federal Register 4247.

15) The Federal Water Pollution Control Act as Amended 1972, 33 U.S.C. 1151 et seq., and

16) "[T]he concepts of justice, due process, and equity as established in the traditional and ancient principles of natural law."

Plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Temporary Relief

By separate motion, also filed October 29, 1974, plaintiffs sought a temporary restraining order against three of the corporate defendants: LEISURE, FIRST FIDELITY and PALOMAR. at 5:00 P.M., October 31, 1974, the Court temporarily restrained those defendants from conducting any dredging and pumping operations on the northern shores of Lake Pontchartrain, east of Interstate Highway 10 in the area designated as the eastern portion of EDEN ISLES. The Order was to take effect from the time plaintiffs posted security in the nominal amount of $5,000.00. A hearing on plaintiffs' motion for preliminary injunction was set November 5, 1974, at 9:00 A.M.

Security was never posted by plaintiffs, and, accordingly, the temporary restraining order never became effective.

On November 4, 1974, the hearing was continued by Judge West to November 8, 1974, because all defendants had not been served with notice.

On November 5, 1974, Judge West ordered the issues raised by plaintiffs' motions for preliminary and permanent injunctions referred to the undersigned "to conduct such conferences and hearings and enter such orders as may be necessary in the premises," and ordered hearings to commence at 10:00 A.M. November 14, 1974.

On November 14, 1974, counsel for plaintiffs and all parties served with a copy of the complaint concurred in the reference to the Special Master, and executed and filed in the record their consent and waiver.

Numerous motions, including motions to dismiss, were filed in limine, including improper service of process and lack of

jurisdiction over individual defendants.

By stipulation, counsel for plaintiffs withdrew from the record the 396 exhibits filed with the complaint, dismissed without prejudice the complaint as to each individual federal employee defendant and defendants FIRST FIDELITY and PALOMAR; bifurcated the proceeding severing the issues of injunctive relief and declaratory judgment from those of damage alleged to arise under 42 U.S.C. 1983; agreed to proceed first on the jurisdictional issue of standing of plaintiffs to sue and the defense of laches raised by the defendants as both issues affected all parties, and finally to try the merits of the preliminary injunction separately as to defendants BRADLEY-McDONALD and LEISURE.

The Projects

The projects sought to be enjoined both lie on the north shore of Lake Pontchartrain in St. Tammany Parish, Louisiana. They are MARINER'S VILLAGE, a development of defendant BRADLEY-McDONALD, which is nestled between the Lake Pontchartrain Causeway and the Prestress Concrete Plant, and EDEN ISLES, alleged a development of LEISURE, which is bounded on the west by U.S. Highway 11, on the east by Salt Bayou, and divided by Interstate Highway 10 into EDEN ISLES EAST and EDEN ISLES WEST. The projects are about twenty-five miles apart, and are separated by the town of Mandeville, Louisiana, and a vast area of still undeveloped wetlands.

Each project is a residential subdivision designed around interior canal systems that find or will find their outlet into Lake Pontchartrain.

Development of EDEN ISLES WEST began in 1970, and it is inhabited by approximately

fifty families. EDEN ISLES EAST is yet undeveloped.

The Pleadings

The complaint is a complex and involved pleading, broad, general and vague in its allegations and difficult to summarize. Its 39th paragraph begins a "General Chronicle and Causes of Action." In support of various allegations, plaintiffs refer to scores of unnumbered and otherwise unidentified exhibits.

Essentially, plaintiffs contend that Lake Maurepas, Pontchartrain, Catherine and Borgne comprise a single ecological unit, referred to as the MPCB estuary, that a "regional, cumulative, environmental impact study" is essential, and that there should be a moratorium on "developments affecting" the unit for at least thirty months, presumably to permit completion of such a study. They allege that the CORPS disregards the need for study and issues permits arbitrarily and capriciously for developments which will cause immediate and irreparable damage to plaintiffs, principally in loss of commercial and sport fishing and hunting.

Plaintiffs allege that EDEN ISLES comprises approximately 6,000 acres; that it was once wetlands in the MPCB estuary; that in 1927 Drainage District No. 2 was created in St. Tammany Parish; that the area was drained without a permit under the Rivers and Harbors Act of 1899; that during the depression the Drainage District defaulted in its bond obligation, and the area returned to its original condition as wetlands. Further, that during 1963, the St. Tammany Parish Police Jury became the governing body of the Drainage District. The area was again drained without a permit, and in June, 1972, the Police Jury

entered into an agreement with LEISURE for development of the area.

Prior to or during a hurricane September 7, 1974, plaintiffs allege, the Drainage District's levee or dike in EDEN ISLES EAST broke, and again without first obtaining a permit from the CORPS, repairs are being made to the levee and the area pumped dry.

Plaintiffs also allege considerable development of EDEN ISLES WEST, including thirteen miles of interior canals for which no permit was issued. A permit was issued by the CORPS to LEISURE without an Environment Impact Statement (EIS) March 9, 1973, for dredging and maintenance of an entrance channel from the Yacht Basin in Grand Lagoon to Lake Pontchartrain, based upon the conclusion of the CORPS' District Engineer that environmental statement was not required. Plaintiffs allege that the issuance of the permit under such conditions is illegal.

The DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, plaintiffs contend, violated the Interstate Land Sales Act in failing to require an EIS.

Plaintiffs admit the December 20, 1973, issuance of a dredge and fill permit by the CORPS, following public hearing, to defendant BRADLEY-McDONALD for an entrance channel to Lake Pontchartrain at MARINER'S VILLAGE, but allege the CORPS acted arbitrarily and capriciously in issuing the permit without an EIS.

Injunctive Relief Sought

Plaintiffs seek:

1) To enjoin and revoke any permits issued to LEISURE, INC. for dredge and fill operations

in EDEN ISLES WEST.

2) To enjoin the POLICE JURY, LEISURE and the CORPS from dredging, depositing spoil, cutting interior canals "in violation of Section 10 of the Rivers and Harbors Act of 1899."

3) To enjoin the POLICE JURY, LEISURE and the CORPS "from destroying . . . the eastern undeveloped protion of Eden Isles."

4) To enjoin the CORPS from issuing permits to LEISURE for dredge and fill in the eastern portion of EDEN ISLES.

5) To enjoin and order the POLICE JURY to remove all dikes around both EDEN ISLES EAST and WEST.

6) To enjoin the POLICE JURY from charging 50¢ per copy of records and documents pertaining to Drainage District #2.

7) To enjoin LEISURE and the POLICE JURY from "bulldozing, dredging, trucking, pushing mud and blocking levees and dykes; cutting interior canals, constructing apartment complexes, bulldozing, dragging poles on the North Shores of Lake Pontchartrain."

8) To enjoin construction by BRADLEY-McDONALD until an EIS is prepared; and

9) To enjoin the CORPS from refusing to include interior canal systems within their permit jurisdiction.

Other relief sought by plaintiffs include long-term cumulative scientific studies of the MPCB eco system by persons appointed by the Court, declaratory relief, and damages.

EDEN ISLES

At the hearings certain defense witnesses were presented out-of-turn and before the close of plaintiffs' case by agreement of the parties

for their convenience and that of the witnesses. Defendants reserved their rights to present appropriate motions at the close of plaintiffs' case without consideration of this testimony. At the close of plaintiffs' case the defendants moved to dismiss plaintiffs' motion for preliminary relief, and this motion was granted. The following fingings of fact, conclusions of law, and recommendations with regard to the EDEN ISLES aspect of the case are based on the testimony of the witnesses and other evidence offered by plaintiffs which the Court found insufficient to justify preliminary relief. Because defendants did not have an opportunity to fully present their evidence, and because plaintiffs have not had an opportunity to offer rebuttal evidence, and in accordance with the reservations made when the evidence was offered out-of-turn, the Court has not considered this evidence; however, the Court will, of course, consider this testimony if it becomes appropriate in the future course of this litigation.

Findings of Fact

1.

EDEN ISLES is an area on the northern shores of Lake Pontchartain and is bisected by Interstate Highway 10 into areas commonly known as EDEN ISLES WEST and EDEN ISLES EAST.

2.

No evidence was presented as to the ownership of EDEN ISLES or any protion thereof.

3.

A portion of EDEN ISLES WEST has been under development as a residential subdivision arranged around an interior canal system since approximately 1970.

4.

Plaintiffs offered no evidence of the extent or character of the development at EDEN ISLES; however, the on-side inspection by the

Special Master revealed that the interior canal system associated with the project is virtually complete except for the completion of the installation of concrete bulkheads in certain of the existing canals, that streets are laid and approximately 50 houses are built and apparently occupied. A golf course is also under construction.

5.

This interior canal system is connected to Lake Pontchartrain through Grand Lagoon.

6.

A permit under Section 10 of the Rivers and Harbors Act of 1899 was issued to LEISURE, INC. by the CORPS OF ENGINEERS for certain dredge and fill operations in the EDEN ISLES area; however, the permit was offered into evidence, and the Court does not know the nature of the work authorized by the permit, the area covered, or any other terms of the permit.

7.

No public hearings were conducted by the CORPS prior to the issuance of the permit, and no Environmental Impact Statement within the meaning of Section 102 of the National Environmental Policy Act of 1969 was prepared.

8.

In approximately 1927, the area now known as EDEN ISLES was enclosed with dikes and levees and pumped dry; however, this system was not maintained during the depression years, and the area reflooded.

9.

In the years after this flooding, the area now known as EDEN ISLES was abundant with soft shell crabs, shrimp, and certain species of game birds, and was commercially fished by various persons, including some members of SOWL and

their families.

10.

The area now known as EDEN ISLES was redrained in 1963, and has not supported the wildlife which formerly inhabited the area and has not been commercially fished by members of SOWL or anyone else since that time.

11.

The testimony of plaintiffs' expert witnesses is that Lake Pontchartrain forms part of an ecological unit comprising Lakes Maurepas, Pontchartrain, Catherine and Borgne.

12.

Plaintiffs offered the testimony of several experts. The Court was most impressed by Dr. John W. Day, Jr., who was qualified as an expert in Marine Ecology and Marine Biology.

13.

As a scientist, Dr. Day considers an estuary to be a natural ecological system which must be viewed as a unit and that every unnatural activity introduced into or removed from it has some effect upon it.

14.

Although it is Dr. Day's opinion that dredging of channels into Lake Pontchartrain could have an effect upon the ecological unit, he does not consider EDEN ISLES as a major project that will by itself have any measurable effect upon the estuary and concedes that there is no scientific evidence of any activity on the north shore of Lake Pontchartrain that has had a significant detrimental effect upon the ecology in St. Tammany Parish.

15.

John E. Burgess, Jr., biologist in charge of the Lafayette, Louisiana, office of the United States Fish and Wild Life Service and qualified

as an expert in aquatic biology and fishery biology, has had most of his experience with developments involving canals in the State of Florida, where soil conditions for such projects are less favorable than the Lake Pontchartrain area.

16.

Mr. Burgess believes that the exchange of water between the canals of EDEN ISLES and Lake Pontchartrain will have some minor effect in the Lake but that dilution makes that effect so small it could not be found. His best estimate of the time when adverse ecological conditions could occur in the canals was between 5 and 30 years.

17.

Thomas L. Bradley, a water pollution control biologist for almost eight years, employed by the Louisiana Wild Life and Fisheries Commission, was called by the plaintiffs, and over the objection of plaintiffs was qualified in his specialty as an expert by the Court. Mr. Bradley testified that he has investigated fish kills within the levee of EDEN ISLES WEST after a portion of the levee had sloughed off and water had been allowed to enter. He found 50 to 55 dead crabs and fewer dead fish. His investigation was at the request of Mr. Fontana, plaintiffs' counsel.

18.

Mr. Bradley was of the opinion that the canals of EDEN ISLES will have little effect upon the waters of Lake Pontchartrain for the reason that he does not believe that the waters of the canals will mix with the waters of the Lake.

19.

Dr. Paul H. Templet qualified as an ex-

pert in water pollution control chemistry and coastal zone management.

20.

Despite the fact he has never performed any studies in the region, Dr. Templet is of the firm opinion that the MPCB eco system is under such "stress" that it is on the verge of collapse. He testified, however, that the degree of stress is unknown and it cannot be assessed until a cumulative study of the entire eco system can be completed.

21.

There is no evidence that plaintiffs will suffer irreparable injury as a result of the action of these defendants if a preliminary injunction is not granted.

Conclusions of Law

This suit arises under the Administrative Procedure Act, 5 U.S.C. §551, et seq., the National Environmental Policy Act. 42 U.S.C. §4321, et seq., and other federal laws cited by plaintiffs' complaint.

2.

This Court has jurisdiction of the subject matter by virtue of 28 U.S.C. §1331 and 5 U.S.C. §§ 701-706.

3.

Injunction is an extraordinary remedy rooted in equity, and the grant or denial of a preliminary injunction addresses itself to the sound discretion of the trial court. Wright & Miller, Federal Practice and Procedure: Civil §§ 2947 & 2948; Johnson v. Radford, 5th Cir. 1971, 449 F.2d 115; Exhibitors Poster Exchange, Inc. v. National Screen Service Corporation, 5th Cir. 1971, 441 F. 2d 560. But, as most recently expressed by Judge

Thornberry, "[t]he district court does not exercise unbridled discretion." Canal Authority of State of Florida v. Callaway, 5th Cir. 1974 489 F. 2d 567.

> "It must exercise that discretion in light of what we have termed 'the four prerequisites for the extraordinary relief of preliminary injunction.' Allison v. Froehlke, 5 Cir. 1972, 470 F. 2d 1123, 1126. The four prerequisites are as follows: (1) a substantial likelihood that plaintiff will prevail on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweights the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest."
>
> 489 F. 2d at p. 572

Moreover, a preliminary injunction "should not be granted unless the movant carries the burden of persuasion." 489 F. 2d at p. 573 and p. 576.

Plaintiffs have failed to carry even the most meager burden of proof of any damage that will befall them as the result of the action or inaction of any defendant such as would justify the extraordinary relief of preliminary injunction.

4.

Plaintiffs have failed to demonstrate that there is (1) a substantial liklihood that plaintiffs will prevail on the merits; (2) a substantial threat that plaintiffs will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiffs outweighs the threatened harm the injunction may do the defendants, and (4) that granting the preliminary injunction will not disserve the public interest.

Recommendation

Accordingly, I recommend that plaintiffs' complaint seeking preliminary injunction against

defendants, UNITED STATES ARMY CORPS OF ENGINEERS; the SECRETARY OF ARMY; the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and his REGIONAL ADMINISTRATOR; THE SECRETARY OF THE DEPARTEMTN OF HOUSING AND URBAN DEVELOPMENT and his ADMINISTRATOR; THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; the ST. TAMMANY PARISH POLICE JURY and its individual members; DISTRICT ATTORNEY WOODROW W. ERWIN and his ASSISTANT JULIAN RODRIGUE of ST. TAMMANY PARISH; and LEISURE, INC., be denied.

Respectfully submitted,

New Orleans, Louisiana, December 19, 1974.

MOREY L. SEAR
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL — CIVIL ACTION

VERSUS — NO. 74-2919

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL — SECTION "H"

FIRST SUPPLEMENTAL SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Pursuant to an Order of Reference of Honorable R. Blake West, United States District Judge, trial on the merits of plaintiffs' application for preliminary injunction was held. By agreement of counsel, the issues relating to the projects of defendants BRADLEY-McDONALD CORPORATION (hereinafter BRADLEY-McDONALD) and LEISURE, INC. (hereinafter LEISURE) were tried separately.

All issues relating to BRADLEY-McDONALD and including the defense of laches were fully litigated November 14,15,16 and 18, 1974, and

resulted in a recommendation by the Special Master that plaintiffs' suit against BRADLEY-McDONALD be dismissed on account of laches.

Following presentation of plaintiffs' evidence, the remaining defendants moved for a directed verdict pursuant to Rule 50(a), Federal Rules of Civil Procedure, which motion was granted for the reasons set forth in the Special Master's Report and Recommendation of December 19, 1975.

Thereafter, counsel agreed to try the defense of laches as to all remaining defendants on January 3, 1974, and that all testimony pertinent to that issue already heard by the Court including defense witnesses heard out of turn at the trial of the merits of preliminary injunction should be considered by the Court.

Based upon the testimony of the witnesses and the evidence introduced at the trial, I now make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1.

All of the property involved in this portion of the suit and developed by LEISURE is located in St. Tammany Parish Drainage District Number 2, on the north shore of Lake Pontchartrain.

2.

St. Tammany Drainage District Number 2 was created pursuant to Article XV, Section 1, of the Louisiana Constitution and Acts of the Louisiana Legislature, which confer upon Parish Police Juries the authority to create drainage districts for the purpose of reclaiming marsh lands. Pursuant thereto, the St. Tammany Police Jury enacted an ordinance, dated November 10,

1925, creating St. Tammany Parish Drainage District No. 2 and appointing the first Board of Commissioners [EXHIBIT P.J.2-A].

3.

Thereafter, the Drainage District began planning the drainage of the area within its territorial confines, and a map showing the location of levees, canals, pumping stations, and roads was prepared on December 18, 1926 [EXHIBIT P.J. 1].

4.

An assessment roll covering property within the Drainage District was prepared on November 13, 1925 [EXHIBIT P.J. 3].

5.

A Board of Appraisers was appointed, to prepare a report assessing the benefits to be derived by persons owning property within the district. This report was confirmed by the decree the Twenty-Second Judicial District Court, Docket No. 4672, dated May 13, 1927 [EXHIBIT P. J. 2-B]. Thereafter, taxes were levied by the Drainage District on May 16, 1927 and June 29, 1927 [EXHIBITS P.J.2-C and 2-D].

6.

By resolution of the Board of Commissioners of St. Tammany Drainage District Number 2, dated July 16, 1927, $440,000 of construction bonds were authorized [EXHIBIT P.J. 2-E], and an additional tax was levied against property in the District on July 23, 1928 [EXHIBIT P.J. 2-G].

7.

An additional $33,000 of construction bonds was authorized by a resolution dated August 27, 1928 [EXHIBIT P.J. 2-G].

8.

Subsequently, improvements were undertaken by the Board, including construction of a care-taker's residence [EXHIBIT P.J. 4], a pumping station, drainage canals, and levees [EXHIBIT

P.J. 6.

9.

The Board of Appraisers was active in 1933 [EXHIBIT P.J. 2-H].

10.

During the Great Depression of the 1930's the Drainage District was inactive, and its facilities and levees suffered deterioration.

11.

In 1953 the Drainage District's bonds were placed in default, and the bondholders secured a default judgment against the District. [EXHIBIT P.J. 7]. This judgment was subsequently satisfied by the United States Marshal's sale of all the property within the Drainage District [EXHIBIT P.J. 8].

12.

In 1962, the St. Tammany Parish Police Jury was constituted as the governing body of the Drainage District. [EXHIBITS P.J. 11-A and 11-B].

13.

In February, 1963, an engineering report for the rehabilitation of the District was prepared [EXHIBIT P.J. 9]. A map was also prepared, showing the layout of levees, canals, the pumping station, I-10, and various other features of the District, which were planned or already in existence [EXHIBIT P.J. 10].

14.

Thereafter, bonds were authorized and issued, various contracts let, taxes levied and assessed, bids advertised and accepted, and other action was taken authorizing the issuance of $330,000 of bonds in July, 1965 [EXHIBIT P.J. 13], and $310,000 of drainage bonds in January, 1966 [EXHIBIT P.J. 14].

15.

Taxes were levied against the property, commencing in 1963 [EXHIBIT p.J. 15].

16.

Numerous contracts for the rehabilitation of the District, including road reconstruction, pumping station repairs and improvements and other matters, aggregating almost $2,000,000 were let between August 21, 1963, and May 16, 1966 /EXHIBIT P.J. 17/.

17.

Maps were prepared showing the location of the levees and canals necessary to restore the District to a fully-drained condition /EXHIBITS P.J. 18, 19 and 20/.

18.

Mr. Clifford C. Ouder, presently employed as manager of the Drainage District's pumping station and as overseer of the levees, testified that he is 56 years of age and has been familiar with Drainage District Number 2 all his life.

19.

In 1928, at the age of 10, Ouder remembers the area as mostly marsh land, which was diked and drained, and that canals were dug, levees were erected, and a pumping station was built.

20.

Shortly after the area was diked and drained, it was a dry prarie with naked ground and non-marsh type vegetation grew in the area, consisting of broom sage, mongo bushes and roseau bushes. The broom sage was harvested for use as brooms, and some of the area was farmed for varuous vegetable crops.

21.

The area was again drained in 1963; the old levees rebuilt; the canals and drainage ditches cleaned out; the pumping station was renovated, and by 1965 or 1966 the area was completely dry again.

22.

The canals, levees, and pumping station have been continuously maintained since renovation was completed in 1965 or 1966.

23.

All of the ground in both Eden Isles East and West is now dry ground and has been since 1963.[1] The area no longer exists in its original natural state and is either substantially developed or prepared for development.

24.

LEISURE's property within the St.Tammany Drainage District Number 2 consisted of 5,300 acres and was divided by Interstate Highway 10. The 2,300 acres of the LEISURE development east of I-10 is referred to as Eden

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1 After Hurricane Carmen, in September, 1974, there was a bread in the levee in Eden Isles East, which was repaired in three to four weeks.

Isles East, and 3,000 acres on the west of I-10 is referred to as Eden Isles West.

25.

LEISURE acquired what is know known as Eden Isles East and West in January, 1969. Since then, Leisure's costs to develop Eden Isles have exceeded $26,000.00 for land acquisition, engineering, land fill, sewers, sewer treatment facilities, pumping stations, water facilities, streets, bulkheads, bridges, maintenance, and advertising.

26.

One portion of Eden Isles West, consisting of about 1,400 acres, has been developed by a canal system, with about 1,400 to 1,500 lots bodering on the canals. Almost all of the lots bodering on the canals have been sold to individual purchasers, and neither EDEN ISLES nor LEISURE has any ownership interest in that property. About 52 homes have already been

constructed in the area. About 900 acres remain in the Western portion.

27.

Thomas Edwin Patton was first employed by LEISURE in June, 1970, as the vice-president responsible for the Eden Isles development. He became president in March, 1971 and remained with LEISURE until February [illegible] 1974.

28.

When Patton arrived in June, 1970, the perimeter canal had been constructed on the west side. As of October 31, 1970, shortly after he arrived, LEISURE had expended a total of $5,500.00 on the project, including land acquisition.

29.

Construction of the perimeter and interior canal system in the western protion of Eden Isles was begun in 1969 and completed by March, 1973. Development of EDEN ISLES was progressing virtually every day; and during the period 1970 through 1973, work was carried on 24 hours a day.

30.

The excavation contractor used six to nine draglines and four to six bulldozers at a time. One dragline had a boom 110 feet long that could be seen five miles away. At times there were two dredges on the job. The equipment was lighted at night, and the large draglines had lights on them. The dredges worked 24 hours a day and were lighted "extremely well" and looked like "floating cities'.

31.

The work was visible in the day time and at night, from both Highway 11 and Interestate 10.

32.

Work completed in Eden Isles as of Dec-

ember 26, 1974, was:

Unit 1 and 1A	99%
Unit 2 and 2A	99%
Unit 3	99%
Unit 4	53%
Unit 5	21%

[EXHIBIT L-159].

33.

A golf course, 90% completed, is located in the northern portion of EDEN ISLES WEST.

34.

Eighteen miles of canals have been dug, and no further canal work is contemplated. All that remains is the completion of the work already started on the streets, sewer system, and water systems, and completion of the bulkheading of canals which have already been dug.

35.

LEISURE owns about thirty percent of the land in EDEN ISLES EAST. The rest of the land has been sold, or is under option, to others. LEISURE has no intention of doing any dredging or excavation on the East side, and the only work that LEISURE has performed on the East side has consisted of the maintenance of levees.

36.

LEISURE has incurred costs with respect to the East side which total about $739,000 over and above LEISURE's own land acquisition costs.

37.

LEISURE's sales of property on the East side have totaled over $4,000,000.

38.

About 800 to 900 lots and other property, totaling over $18,000,000, have been sold by LEISURE subject to LEISURE's meeting certain improvement and construction obligations with respect to roads, sewerage, water, streets, bulkheads and drainage. These property owners are not parties to this litigation.

39.

LEISURE's financing has been suspended pended the outcome of this suit.

40.

LEISURE paid drainage district taxes every year amounting to about $200,000, on drainage district bonds and assessments, and in addition, LEISURE paid ad volorem taxes on the land it owned.

41.

Advertising of the project in the general New Orleans Metropolitan area began around January or February of 1970. The methods of the advertising included newspaper, television, radio, brochures, pamphlets, magazines, and billboards. Through September, 1974, $853,636.91 had been expended [EXHIBIT L-166].

42.

Publicity of the EDEN ISLES development was widspread throughout the Orleans, Jefferson, and St. Tammany Parish areas, through radio, television, and newspaper articles and advertisements. Over one hundred different news articles and advertisements appeared in newspapers alone.[2]

43.

The progress of the work continuously appeared in newspapers, with advertisements and maps showing the exact location of EDEN ISLES on the northern shore of Lake Pontchartrain, and with offers of tours and promotional

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[2] Numerous articles appeared in the Times-Picayune, the Slidell Century News, the St. Tammany Times, the Century News, Dixie Roto Magazine, the State-Times, Baton Rouge, Louisiana, New Orleans Magazine, Accolade (Magazine of Slidell area), Greater Slidell Area Housing Guide, and the special Eden Isles publication "Eden Isles Currents".

campaigns.

44.

As early as March, 1970, newspaper articles began, advertising the advantages of waterfront property on inland canals.

45.

Buddy Broadway, LEISURE's project engineer, prepared and submitted to the CORPS, in October, 1971, LEISURE's initial application for a Section 10 Permit. This initial application covered only the dredging of an entrance channel from lake Pontchartrain into Grand Lagoon. However, the CORPS subsequently requested that LEISURE submit a revised application covering not only the entrance channel, but also the interior canal system and the connecting channel to Lake Pontchartrain.

46.

LEISURE's revised application was prepared and submitted to the CORPS, on February 21, 1972. This application stated that during the construction of the entire project approximately thirty-six million cubic yards of material would be excavated. The attachments to the permit application show that the entrance channel was to be dredge to ten feet below mean low water. Also attached to the application were subdivision plans for EDEN ISLES EAST and WEST showing the canal systems proposed for each area.

47.

Public notice of LEISURE's revised application was given on or about February 25, 1972, to a large number of individuals and agencies, as well as news media. The public notice described work: "Character of Work: Dredge and maintain and entrance channel from Lake Pontchartrain and a system of connecting canals. All spoil will be placed on property owned by

the applicant and none will be placed in the lake."

48.

Letters of no objection were obtained from the Louisiana Department of Public Works, the Louisiana Stream Control Commission, the Louisiana Wild Life and Fisheries Commission, and the St. Tammany Parish Police Jury.

49.

Patton testified that a no time did he ever receive a letter, telephone call or correspondence of any kind regarding any objection to the project. Patton further testified that he had never received a complaint with respect to the canal system, nor did he ever receive a communication from either the Environmental Protection Agency or the United States Department of Interior directing that work be stopped.

50.

A Section 10 Permit was issued to LEISURE by the COPPS on March 9, 1973, with the concurrence of the Department of Interior, to dredge and maintain an entrance channel, yacht basin, and connecting channel, and install and maintain bulkheads, fills, revetments, culverts, and docks, in Lake Pontchartrain and Grand Lagoon.

51.

In the December 19, 1974, Report of the Special Master, in Finding of Fact Number 6, at page 25, concerning EDEN ISLES, the Special Master found that the Permit issued LEISURE under Section 10 of the Rivers and Harbors Act of 1899 was not in evidence. The Permit dated March 9, 1973, is in evidence as PLAINTIFF EXHIBIT 229.

52.

The March 9, 1973, Permit was issued with-

out an Environmental Impact Statement (EIS).

53.

No evidence was offered of bad faith of any defendant in the course of the development of EDEN ISLES.

54.

Commercial fishermen who are members of SOWL and who live in the vicinity of EDEN ISLES testified that they knew of the original Drainage District No. 2 of the subsequent development of EDEN ISLES, and because of the redraining of the area in 1963 they have been unable to fish there for over ten years.

55.

Mary Halpin, the president of SOWL, testified by deposition that she had been aware of the development of EDEN ISLES for "one or two years." [EXHIBIT G-10, p. 10].

56.

After public notice of LEISURE's permit application on February 25, 1972, and prior to the issuance of the Permit more than one year later on March 9, 1973, neither plaintiff FRANCOIS JELALAIN nor any other member of SOWL made any protest, objection, or comment concerning the Permit or any other aspect of the project to LEISURE, the CORPS, the ST. TAMMANY PARISH POLICE JURY, or any other defendant in this lawsuit.

Conclusions of Law

1.

Defendant have raised a defense that plaintiffs' complaints against them are barred by laches and have presented evidence in support of this defense. A defense of laches can be properly asserted in environmental litigation. Lathan v. Volpe, 9th Cir. 1971, 445 F.2d 1111, 1122; I-291 Shy? Ass'n v. Burns, 372 F. Supp.

223 (D. Conn. 1974); Smith v. Schlesinger, 371 F. Supp. 559 (C.D. Calif. 1974); Centerview/Glenn Avalon Homeowners Ass'n v. Brinegar, 367 F. Supp. 633 (C.D. Calif. 1973); Minnesota Public Interest Research Group v. Butz, 358 F Supp. 584 (D. Minn. 1973); Clark v. Volpe, 342 F. Supp. 1324 (ED La. 1972), aff'd 461 F. 2d 1266; Harrisburg Coalition Against Ruin Envir. v. Volpe, 330 F. Supp. 918 (MD Pa. 1971); Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (Md Pa. 1970).

2.

"Laches is determined in the light of all the existing circumstances and required that the delay be unreasonable and cause prejudice to the adversary." Clark v. Volpe, supra; Pennsylvania Environmental Council v. Bartlett, supra; Sobosle v. United States Steel Corporation, 3rd Cir. 1966, 359 F. 2d 7. Laches is not merely a question of time but also a question of the diligence of the plaintiffs viewed under all the circumstances of the case. Clark v. Volpe, supra; Burnett v. New York Central Railroad Company, 380 US 424, 85 S.Ct. 1050 (1965); Wiley v. United States, 245 F. Supp. 669 (Ed Ill. 1965).

3.

Plaintiffs' suit was filed October 29,1974, considerably after the acts of which they complain were performed. Part of their suit is an attack on the creation of the St. Tammany Parish Drainage District No . 2 which was originally constituted in 1927, and was revitalized in 1963. Work which plaintiffs allege was illegally done without necessary permits was started in 1970. The Permit which plaintiffs allege was illegally issued without an Environmental Impact Statement was publicly noticed February 25, 1972, and was issued March 9, 1973. The work which plain-

tiffs allege was illegally issued without an Environmental Impact Statement was publicly noticed February 25, 1972, and was issued March 9, 1973. The work which plaintiffs seek to enjoin and the development they wish to remove are virtually complete. Plaintiffs' suit is allegedly to protect the character of the area as wetlands, but the area has not had that character for over ten years, and was originally altered in 1927.

Plaintiffs have been aware of the revitalization of Drainage District No. 2 and the development of EDEN ISLES for many years. The project is a relatively large development and is not easily overlooked. The developers have spent over $850,000 in advertising and public relations in an effort to make the porject known to prospective purchasers in St. Tammany Parish and the entire New Orleans Metropolitan area.

Defendants have been prejudiced by plaintiffs' delay in bringing suit. Public funds have been expended for the restoration of Drainage District No. 2

LEISURE has invested $26,000,000 in the development of EDEN ISLES. Additionally, members of the general public who are not parties to this suit have purchased land in the area, and many have built homes and have established their families there.

That part of plaintiffs' suit which seeks to enjoin or remove development in EDEN ISLES and ST. TAMMANY PARISH DRAINAGE DISTRICT NO. 2 is barred by laches.

Recommendation

Accordingly, I recommend that that part of plaintiffs' complaint against defendants UNITED STATES ARMY CORPS OF ENGINEERS; the SECRETARY

OF THE ARMY: the ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY and his REGIONAL ADMINISTRATOR: THE SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT and his ADMINISTRATOR: THE DEPARTMENT OF HOUSAND AND URBAN DEVELOPMENT: the ST. TAMMANY PARISH POLICE JURY and its individual members; DISTRICT ATTORNEY WOODROW W. ERWIN and his ASSISTANT JULIAN RODRIQUE of ST. TAMMANY PARISH; and LEISURE, INC., which seeks to enjoin or remove development in EDEN ISLES and ST. TAMMANY PARISH DRAINAGE DISTRICT NO. 2 be DISMISSED as barred by laches.

Respectfully submitted,

New Orleans, Louisiana, January 10, 1975.

MOREY L. SEAR
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
VERSUS	NO: 74-2919
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	SECTION H

O R D E R

SAVE OUR WETLANDS, INC. (SOWL) and FRANCOIS JELALIAN in their behalf and in behalf of others seeking to preserve the environment along the North Shore of Lake Pontchartrain and its connecting waters brought this action against various federal and state governmental agencies, their directors, certain individuals, and two corporate real estate developers.

Among other things, the suit seeks to enjoin the commerical projects known as MARINER'S VILLAGE, a development of defendant BRADLEY-McDONALD, INC., and EDEN ISLES, a development of LEISURE, INC. and to return them, along with other areas

within the jurisdiction of the ST. TAMMANY PARISH POLICE JURY to their "natural" state, which plaintiffs contend to be wetlands.

The Court ordered the matters relating to injunction referred to a United States Magistrate as Special Master for hearings and to report to the Court his findings of fact and conclusions of law, and to make recommendations to the Court. No objection to the reference was made, and all parties to the proceedings filed in the record a stipulation of consent to the reference.

After careful review of the pleadings, the record, exhibits and evidence, study of the findings of fact, conclusions of law, and recommendations of the Special Master, conferences with him on several occasions, and considering the law applicable to the case, the Court adopts the Special Master's Report and Recommendation and First Supplemental Report and Recommendation as its opinion.

The matter did not reach trial on the merits, and accordingly the Special Master made no findings or conclusions as to whether the projects required or had been developed with federal permits, Environmental Impact Statements, or in accordance with applicable federal law.

The developments in the projects that arguably require federal permits or Environmental Impact Statements are:

1) At defendant BRADLEY-MCDONALD's MARINER'S VILLAGE, an entrance channel, connecting canal, and harbor area in Lake Pontchartrain in accordance with a plan attached to a permit issued by the UNITED STATES ARMY CORPS OF ENGINEERS dated December 20, 1973 [Bradley-McDonald Exhibit 10].

2) At defendant LEISURE, INC.'s EDEN ISLES, a system of perimeter and interior canals connected to Grand Lagoon and Lake Pontchartrain.

3) At ST. TAMMANY PARISH DRAINAGE DISTRICT No. 2, which is co-extensive with EDEN ISLES, a levee system, drainage canals, and a pumping station.

The extent of the development of canal and channel systems contemplated by LEISURE, INC., is well defined in Defendants' Exhibits L-1 and 160.

The Special Master found these three projects substantially complete. Both commercial developments do contemplate further work, typically associated with residential subdivision development.

Plaintiffs' original complaint sought injunctive and other relief against both developments to prevent further dredging and work without permits issued by various federal agencies or Environmental Policy Act (NEPA). The Special Master found that neither BRADLEY-MCDONALD nor LEISURE nor any other defendant contemplate further dredging canal construction or related type work. Much of the area known as EDEN ISLES has been sold to other parties not before the Court, and there is no evidence that any such parties contemplated dredging, canal construction or work that would arguably require federal permits or any "major federal action" within the meaning of NEPA.

Moreover, the continuing effect of the Federal Water Pollution Control Act and other federal statutes impose on-going responsibilities on the part of the developers and landowners, and violations of these statutes can result in revocation of any existing permits[1] or other punitive action.

The Court concurs that plaintiffs' suit against the substantially complete developments outlined in the Special Master's reports and shown in Defendants' Exhibits L-1 and 160 and Bradley-McDonald Exhibit 10, is barred by laches; however, any further work that might be contemplated by defendants or third parties at either development is unaffected by this opinion, and would, of course, proceed in accordance with all applicable laws would be subject to review in the courts.

Accordingly, let judgment be entered DISMISSING plaintiffs SAVE OUR WETLANDS, INC.'s and FRANCOIS JELALIAN's petition for injunctive relief and for declaratory judgment.

New Orleans, Louisiana, this 27th day of January, 1975.

UNITED STATES DISTRICT JUDGE

1 See Permit issued LEISURE, INC. [Plaintiffs' Exhibit 229] and Permit issued BRADLEY-McDONALD [Bradley-McDonald Exhibit 10], which provide in part:

"(g) That this permit may at any time be modified by authority of the Secretary of the Army if it is determined that, under existing circumstances, modification is in the public interest.* The permittee, upon receipt of a notice of modification, shall comply therewith as directed by the Secretary of the Army or his authorized representative.

(h) That this permit may be revoked by authority of the Secretary of the Army if the permittee fails to comply with any of its provisions or if the Secretary determines that, under the existing circumstances, such action is required in the public interest.*

*A judgment as to whether or not suspension, modification or revocation is in the public interest involves a consideration of the impact that any such action or the absence of any such action may have on factors affecting the public interest. Such factors include, but are not limited to navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people."

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL — CIVIL ACTION

VERSUS — NO. 74-2919

UNITED STATES ARMY CORPS OF ENGINEERS ET AL — SECTION "H"

ORDER

At a hearing on February 20, 1975 on objections to the Master's Report, the Court, after argument of all counsel:

1. Overruled the so-called "objections" to the Master's Report;
2. Denied plaintiffs' motion for a new trial; and
3. Reinstated its order of January 17, 1975, for the reasons stated in the record and as follows:

F.R.Civ. P. 53(3)(2) entitled "Master's Report for Non-Jury Action" states:

"In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

This rule has been interpreted to require the objecting party to file specific objections to findings of fact by the Master for consideration by the Court and to serve such objections on the opposing parties and the Court prior to hearing in accordance with F.R.Civ. P. 53(e)(2) and F.R.Civ.P.6(d).

Moore's Federal Practice, 2d Ed,Vol. 5a, P53.11, p. 2994, on the question of objections to the Master's Report, provides:

"Objections to the master's report have been likened to special demurrers

> and to assignments of error in appellate proceedings, but in an event it is clearly established that they must specifically point our the errors complained of so as to raise well-defined issues for the court's consideration. Since mere general objections would compel the court to review the whole case, and thus would defeat the very purpose of reference, such vague and general objections should be overruled."

At the hearing argument of counsel for plaintiffs was allowed by the Court for the record; however, counsel's argument was directed primarily to substantive issues and not to specific findings of the Master on the issue of laches. Further, written argument was not in the form of objection to findings and was not properly served on opposing counsel or the Court. Counsel for plaintiffs made reference to exhibits, at least some of which, as the Court has observed and noted, were not in evidence, and thus not proper for consideration by the Master at trial, and not properly before this Court at the hearing. The Court ruled that none of the so-called "objections" was in conformity with the requirements of Rule 53; overruled all of the "objections"; then ruled on each "objection" individually.

Under Rule 53 it is clearly established that objections to the Master's Report must specifically point out the errors complained of so as to raise well-defined issues for the Court's consideration.

The so-called "objections" filed by plaintiffs to the Master's findings are so argumentative, vague, confusing and general that they do not meet the specificity requirements of Rule 53 and do not properly challenge any of the facts found by the master which bear on the issue of laches, which was the only issue before the Court/ It might be noted, inferentially, that the plaintiffs literally dumped upon the Master a hughe, ill-

assorted, and poorly organized batch of so-called exhibits, most of which have been identified by more than one letter or number.

At the hearing the findings of the master, not having been shown to have been clearly erroneous, were adopted by the Court.

On the question of the granting of a new trial, F.R.Civ.P. 59 provides:

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues. . .; (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the dourt may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

Although both Rule 59 and Rule 53(e)(2) provide for new evidence to be received at the hearing on the report in the Court's discretion, the Court finds that no new evidence was properly offered for presentation at the hearing and no sufficient reasons for not having presented relevant testimony at trial were argued.

New evidence should meet the traditional test which requires that movant ". . . show facts from which the court may infer reasonable diligence on the part of the movant . . ." in attempting to discover the evidence. Moore's Federal Practice, 2d Ed., Vol. 6a P59.08[4], pp. 59-123.

The Court found that the testimony offered at the hearing, that of Dr. Aiken, who is a resident of this area, could have been available to counsel prior to trial and, at any rate, was not shown to be in any way relevant to the issue of laches.

For the foregoing reasons, as well as those contained in the record as stated a the

hearing, the motions for a new trial were denied, and the objections to the Master's Report were overruled. Further, the previous ruling of this Court, issued on January 17, 1975, was reinstated.

New Orleans, Louisiana this 25th day of February, 1975.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SAVE OUR WETLANDS, INC. (SOWL) ET AL	CIVIL ACTION
VERSUS	NO. 74-2919
UNITED STATES ARMY CORPS OF ENGINEERS, ET AL	SECTION "H"

SUPPLEMENTAL ORDER

In this matter the Court has received two Reports Recommendations made by the Special Master. The Special Master's Report and Recommendation issued on December 19, 1974 (hereinafter referred to as the "First Report") recommended that the plaintiffs' claim for preliminary and permanent injunctive and declaratory relief against one defendant, Bradley-McDonald, Inc., be dismissed as barred by laches, and that the plaintiffs' demand for preliminary injunctive and declaratory relief against Leisure, Inc., and the remaining de-

fendants be denied on grounds that there was a finding of no immediate and irreparable injury.

Thereafter, the plaintiffs filed timely objections to the December 19, 1974 report, but have failed to date to set the objections for hearing, and the recommendations of the First Report were found by the Court to have not been clearly erroneous and were therefore adopted by the Court by its order of January 27, 1975. Subsequently, on January 10, 1975, the Special Master issued a First Supplemental Report and Recommendation (hereinafter referred to as the "Second Report"), which recommended that the plaintiffs' claim for permanent injunctive and declaratory relief against all other defendants be dismissed as barred by laches.

As stated, on January 27, 1975 the Court issued an order, adopting both of the Special Master's Reports, dismissing the plaintiffs' claim for both preliminary and permanent injunctive and declaratory relief against Bradley-McDonald, Inc., Leisure, Inc., and all remaining defendants as barred by laches. The Court issued this order under the mistaken impression that ten days had elapsed since service of the Second Report on the parties without the filing of objections thereto.

It now appears that timely objections were made to the findings embodied in the Second Report and noticed for hearing by the plaintiffs' in accordance with Fed.R.Civ.P. 53(e)(2). Because of the plaintiffs' failure to file timely notice of a hearing on objections to the First Report, the Court's order of January 27, 1975 is unaffected insofar as the dismissal of the plaintiffs' claim for both preliminary and permanent injunctive and declaratory relief against Bradley-McDonald, Inc. and preliminary injunctive and declaratory relief as to Leisure,

Inc. and the remaining defendants; however, that order is suspended insofar as the dismissal of the plaintiffs' claim for permanent injunctive and declaratory relief against Leisure, Inc. and all remaining defendants.

Plaintiffs have noticed their objections to the Second Report, issued January 10, 1975, to be heard on February 5, 1975. The Court hereby continues the February 5, 1975 hearing until 9:00 a.m. on February 20, 1975, in order to allow sufficient time for the hearing of plaintiffs' objections. At that time the Court will receive evidence as to whether or not the Second Report's recommendation is clearly erroneous, i.e., whether or not the recommendations contained in the Second Report that plaintiffs' claim for permanent injunctive and declaratory relief against Leisure, Inc. and the remaining defendants should be dismissed as barred by laches.

New Orleans, Louisiana, this 31st day of January, 1975.

UNITED STATES DISTRICT JUDGE

SAVE OUR WETLANDS, INC. (SOWL), et al., Plaintiffs-Appellants,

v.

UNITED STATES ARMY CORPS OF ENGINEERS et al., Defendants-Appellees.

No. 75-1750.

United States Court of Appeals, Fifth Circuit.

April 4, 1977.

Action was brought by environmental group to enjoin further construction of real estate project. The United States District Court for the Eastern District of Louisiana, at New Orleans, R. Blake West, J., entered a judgment overruling objections to special master's report recommending dismissal of complaint as barred by laches and an appeal was taken restricted to issues of laches. The Court of Appeals, James C. Hill, Circuit Judge, held, inter alia, that the plaintiffs had been guilty of delay when they waited many years after construction which most drastically altered the basic character of former swampland before bringing suit, that the delay was inexcusable because of the highly publicized and visible nature of project and that because of defendant's large expenditures on development and advertising and minimal impact on environment by completion of contract, the requested postponement of further construction pending environmental impact statement would unduly prejudice defendants.

Affirmed.

1. Health and Environment ⇐25.5

Equitable doctrine of laches can apply in context of environmental litigation; to apply defendant must show a delay in asserting right or claim, that delay was not excusable, and that there was undue prejudice to parties against whom claim was asserted.

2. Health and Environment ⇐25.5

Environmental group bringing action for declaratory and injunctive relief to halt real estate development located on drained land on shore of lake were guilty of unreasonable delay where the actions which most drastically change area took place many years before action was begun and to the extent the plaintiffs were challenging issuance of permit by Corps of Engineers they were guilty of unreasonable delay where they failed to present any comments or make objections at public hearing on application and waited more than 19 months after permit was issued before bringing action. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq., Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

3. Health and Environment ⇐25.5

Record in action by environmental group for declaratory judgment and order restraining real estate development on drained land showed that the delay of plaintiffs in asserting claim was inexcusable due to the highly visible and publicized nature of project which had been continuing for a number of years prior to the bringing of litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.; Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C.A. § 403.

4. Health and Environment ⇐25.5

Plaintiffs, until they received an indication to contrary, were entitled to

presume that public officials responsible for approving objected to real estate project would act in accordance with law, but since they were on notice that the construction of development was well underway before public notice of developer's permit application was issued they knew or should have known that environmental effects of construction might well occur before preparation of an environmental impact statement, and wait of more than two and one-half years after permit was issued was an inexcusable delay given visibility and publicity of development. Rivers and Harbors Appropriation Act of 1899, §)10, 33 U.S.C.A. § 403.

5. Equity ⇐71(1)

Mere lapse of time does not constitute laches.

6. Health and Environment ⇐25.5

In assessing degree of prejudice to defendant real estate developer, sued by environmental group to enjoin the state project, caused by the inexcusable delay of plaintiffs in bringing suit, court was required to balance equities, considering both expenditures which had been made by defendants and the environmental benefits which might result if plaintiffs were allowed to proceed with litigation. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

7. Health and Environment ⇐25.10

In view of record showing that defendant real estate developers had expended over $26,000,000 on project before bringing of suit by environmental group to enjoin further construction and that large portions of project had been substantially completed by that time and one of plaintiff's own witnesses concluded that the development would have a minimal environmental impact, requested postponement of further construction pending preparation of an environmental impact statement would unduly prejudice defendant and was denied. National Environmental Policy Act of 1969, § 2 et seq., 42 U.S.C.A. § 4321 et seq.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, and HILL and FAY, Circuit Judges.

JAMES C. HILL, Circuit Judge:

The plaintiffs in this environmental case are appealing from an order and judgment dismissing their complaint on the ground that it is barred by laches. Save Our Wetlands, Inc., ("SOWL"), a Louisiana non-profit corporation, and Francois Jelalian, a private individual, brought this action for declaratory and injunctive relief on October 29, 1974, naming as defendants 37 individuals, corporations and governmental agencies. The federal defendants named were the United States Army Corps of Engineers, the Environmental Protection Agency, and the Department of Housing and Urban Development, together with various officers of these agencies. The non-federal defendants included Leisure, Inc. ("Leisure") and Bradley-McDonald Corporation ("Bradley-McDonald"), the developers of two real estate projects known, respectively, as Eden Isles and Mariner's Village.

The plaintiffs alleged in their complaint that the two real estate developments, located on the north shore of Lake Pontchartrain, were causing serious adverse effects on the environment. The complaint contended that lakes Maurepas, Pontchartrain, Catherine and Borgne, all located in Southern Louisi-

ana, comprised a single ecological unit, referred to as the MPCB estuary, and that this ecosystem was on the verge of "collapse" due to the allegedly indiscriminate development of the Mariner's Village and Eden Isles projects. The plaintiffs' principal allegation concerned the validity of certain permits issued to Leisure and Bradley-McDonald by the United States Army Corps of Engineers ("the Corps"). The plaintiffs alleged that the Corps had violated the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. § 4321 *et seq.*, and various other federal statutes, by issuing the permits pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899 ("Rivers and Harbors Act"), 30 Stat. 1151, 33 U.S.C. § 403. The plaintiffs urged the district court to order an immediate regional cumulative study of the MPCB estuary and to impose a 30-month moratorium on the issuance of further Corps of Engineers permits in the MPCB area.

Two days after the complaint was filed, the district court entered an *ex parte* order temporarily restraining Leisure from conducting pumping and dredging operations adjacent to Lake Pontchartrain. The order was to take effect when plaintiff SOWL posted security of $5,000, but SOWL failed to do so and the order never became effective.

Thereafter, upon stipulation of the parties, the district court referred the suit for trial before a Magistrate sitting as Special Master, pursuant to Rule 53, F.R.Civ.P. Upon agreement of counsel, the Special Master determined to try the issues of standing, laches and preliminary injunctive relief prior to the trial of the other issues.[1]

On December 20, 1974, the Special Master entered his first Report, which included a recommendation that SOWL's motion for preliminary injunction be denied.[2] On January 10, 1975, the Special Master submitted a Supplemental Report containing further findings of fact and conclusions of law and recommending that the complaint be dismissed as barred by laches.

The district court, believing that the time for filing objections had expired, entered a judgment order on January 28, 1975, adopting the Special Master's Report and Supplemental Report and dismissing the action on the basis of laches. Subsequently, upon ascertaining that the objections and motion for a new trial had been timely filed, the district court suspended its previous order and on February 20, 1975, held a hearing on the objections and motion for new trial. Finally, on February 28, 1975, the trial judge entered an order overruling the objections to the Special Master's Reports, denying a new trial and reinstating its previous order of January 17, 1975. This appeal followed.

By order dated September 24, 1975, this Court restricted the issues on appeal to the issue of laches. The appellants

1. Trial was held before the Special Master on November 14, 15, 16, 17, 21, 22, 25, 26, 1974, and January 3, 1975.

2. The Special Master's Report also dismissed certain plaintiffs for lack of standing. The plaintiffs SOWL and Jelalian attempted in their complaint to include as additional plaintiffs various species of wildlife allegedly being destroyed by defendants. For example, the complaint named, among others, rangia cuneata (clam), cynoscion nebulosus (speckled trout), the Southern bald eagle and the American alligator. In his December 20, 1974, report, the Special Master dismissed for lack of standing all of the species of wildlife named as plaintiffs.

have also limited this appeal in terms of the parties to whom it applies. Although the defense of laches was found by the district court to be available to the developers of both Mariner's Village (Bradley-McDonald Corporation) and Eden Isles (Leisure, Inc.), the plaintiffs have not appealed that portion of the district court's judgment pertaining to the Mariner's Village Development. This opinion, therefore, discusses only the facts and issues applicable to the Eden Isles development.

I. *The Facts.*

Eden Isles is a real estate development consisting of approximately 5,300 acres located on the northern shores of Lake Pontchartrain and bisected into two parcels known as Eden Isles East (2,300 acres) and Eden Isles West (3,000 acres). In approximately 1927, the area known as Eden Isles was enclosed with dikes and levees, drained and used for agricultural purposes. These improvements were undertaken pursuant to the authority of the St. Tammany Police Jury, the local governing body responsible for creating drainage districts to be used in the reclaiming of marsh lands. The property on which Eden Isles is located lies within the area known as St. Tammany Parish Drainage District No. 2.[3] Following construction of the improvements by the Drainage District, the area was maintained as dry land until the 1930's when, as a result of the economic depression, the Drainage District became inactive and its facilities and levees suffered deterioration. During this period, the area again flooded.

In 1962, the St. Tammany Parish Police Jury became the governing body of the District and began rehabilitation of the project. Between 1962 and 1966, the Police Jury issued almost $2,000,000 in bonds to finance works to redrain the area and renovate the levees, canals and pumping station. Renovation was completed by 1966 and, except for a brief period in 1974,[4] Eden Isles has been dry land ever since that time. There is no indication in the record that the Police Jury ever applied for or obtained any permit from the Corps of Engineers for any of the installations on Drainage District No. 2.

In January, 1969, Leisure acquired the 5,300 acres known as Eden Isles East and Eden Isles West. From that time until the trial of this case, Leisure spent over $26,000,000 to develop the project.[5] The developments on Eden Isles West include a perimeter and interior canal system, construction of which was begun in 1969 and completed in March, 1973. During this period, development of Eden Isles was progressing virtually every day and, from 1970 to 1973, work was carried on 24 hours a day. Not only has Leisure expended large sums of money on Eden Isles over a period of several years, the development has been a highly visible project since its inception.[6] Moreover,

3. The District was created in 1925 under Louisiana law by an ordinance of the St. Tammany Police Jury, which appointed a Board of Commissioners to supervise the District.

4. After Hurricane Carmen, in September, 1974, there was a break in the levee which, until it was repaired after three or four weeks, caused flooding in Eden Isles East.

5. These expenditures included the costs of land acquisition, engineering, land fill, sewers, sewer treatment facilities, pumping stations, water facilities, streets, bulkheads, bridges, maintenance and advertising.

6. In finding number 30 of his First Supplemental Special Master's Report and Recommendation, the Magistrate stated:

the project has been highly publicized by Leisure since January or February of 1970. Beginning at that time and continuing through September, 1974, Leisure spent over $850,000 to advertise the project in the New Orleans Metropolitan area, using various media, including newspapers, television, radio, brochures, pamphlets, magazines and billboards.

The canal system of Eden Isles West is so constructed that craft departing from the canals pass into a basin known as Grand Lagoon from which they then pass through a channel into Lake Pontchartrain. In October, 1971, Leisure submitted to the Corps an application for a permit under Section 10 of the Rivers and Harbors Act, seeking permission to dredge an entrance channel from Lake Pontchartrain to Grand Lagoon. The Corps thereafter requested that Leisure submit a revised application covering not only the entrance channel, but also the interior canal system and the connecting channel to Lake Pontchartrain. Leisure complied with this request and submitted its revised application to the Corps on February 21, 1972.

On February 25, 1972, the Corps issued public notice of the permit application, describing the work as follows: *"Character of Work*: Dredge and maintain an entrance channel from the Pontchartrain and a system of connecting canals. All spoil will be placed on property owned by the applicant and none will be placed in the lake." Leisure obtained from the Louisiana Stream Control Commission, the Louisiana Wildlife and Fisheries Commission and the St. Tammany Parish Police Jury letters expressing no objection to the issuance of the permit. Subsequently, on March 9, 1973, the Corps, with the concurrence of the Department of the Interior, issued the permit to Leisure.[7] No Environmental Impact Statement was filed concerning the permit. After public notice of Leisure's permit application was made in February, 1972, and prior to the issuance of the permit more than one year later on March 9, 1973, neither plaintiff Jelalian nor any other member of SOWL made any protest, objection, or comment concerning the permit or any other aspect of the project to Leisure, the Corps, the St. Tammany Parish Police Jury, or any other defendant in this lawsuit.

The record indicates that the plaintiffs had knowledge of the Eden Isles project before their suit was filed in October, 1974. Commercial fishermen who are members of SOWL testified before the Magistrate that they knew of the original Drainage District No. 2 and of the subsequent development of Eden Isles. They also testified that they have been unable to fish in the area since 1963, when the area was redrained. Moreover,

The excavation used six to nine draglines and four to six bulldozers at a time. One dragline had a boom 110 feet long that could be seem five miles away. At times there were two dredges on the job. The equipment was lighted at night, and the large draglines had lights on them. The dredges worked 24 hours a day and were lighted "extremely well" and looked like "floating cities."

The Report also noted that the work was visible from Interstate 10 and Highway 11 in the daytime and at night.

7. The permit did not apply to any portion of Eden Isles East. The permit authorized Leisure "to dredge and maintain an entrance channel, yacht basin, and connecting channel and install and maintain bulkheads, fills, revetments, culverts, and docks, in Lake Pontchartrain and Grand Lagoon . . . ." Thus, although the Corps required Leisure to include the interior canal system in its revised permit application, the permit, as issued, did not cover that system.

Mary Halpin, the president of SOWL, testified by deposition that she had been aware of the development of Eden Isles for "one or two years."

The defendants presented evidence that the Eden Isles project was substantially complete by late 1974 when the plaintiffs brought this suit. The Special Master determined from the evidence the extent of the work that had been completed in Eden Isles by December 26, 1974, as follows:

Unit 1 and 1A	99%
Unit 2 and 2A	99%
Unit 3	99%
Unit 4	53%
Unit 5	21%

The Special Master found in his report that 800 to 900 lots and other property, having a value in excess of $18,000,000, had been sold by Leisure subject to its meeting certain improvement and construction obligations with respect to roads, sewerage, water, streets, bulkheads and drainage. He noted further that none of the property owners who had purchased lots from Leisure were parties to this litigation. The Special Master concluded that most of the improvements on Eden Isles had been completed or were near completion when his Supplemental Report was submitted on January 10, 1975. A golf course located on the northern portion of Eden Isles West was 90% complete at that time. In addition, eighteen miles of canals had been dug, and no further canal work was anticipated. The only remaining work involved completion of the construction which had been started on the streets, sewer system, and water systems, as well as completion of the bulkheading on the canals which had been dug. At that time, almost all of the lots bordering on canals in Eden Isles West had been sold to individual purchasers, so that neither Eden Isles nor Leisure had any interest in that property. Although approximately 900 acres remained unsold in Eden Isles West, 52 homes had been constructed in that section.

With respect to Eden Isles East, the Special Master found that Leisure owned only 30% of the land in the section at the time his Report was submitted. The remaining property had been sold, or was under option for sale, to others. The Special Master also concluded that Leisure had no intention of doing any dredging or excavation on the East side and that the only work that Leisure had performed on the East side involved the maintenance of levees.

II. *The Application of Laches.*

[1] It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation. *Ecology Center v. Coleman*, 515 F.2d 860, 867 (5th Cir. 1975); *Clark v. Volpe*, 342 F.Supp. 1324 (E.D.La.1972), *affd.* 461 F.2d 1266 (5th Cir. 1972). As indicated in the *Clark* case, there are three independent criteria which must be met before laches can be applied. The defendant must show: (1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim is asserted. Since we conclude that the district court properly applied these standards to the case at bar, we affirm.

A. *Delay.*

[2] The plaintiff initiated this action on October 29, 1974. The actions com-

plained of by the plaintiffs occurred at different times during several stages of the Eden Isles development and, consequently, the delays involved in bringing this litigation vary in length depending upon the claims presented. To the extent that the plaintiffs are now challenging the conversion of the Eden Isles property to dry land, they have delayed the longest.[8] The construction of dikes, levees and dams was first completed in 1927. After a lengthy interval when the area was again submerged, it was redrained in the 1960's and, except for a three or four week period in 1974, it has been dry land since 1966. Thus, the construction which most drastically altered the basic character of the area was undertaken many, many years before the instant case was begun.

To the extent that the plaintiffs are challenging the Corps of Engineer's issuance of the permit to Leisure in March, 1973, they are again guilty of delay in asserting their claims. The Corps issued public notice of Leisure's permit application on February 25, 1972. Although the permit was not issued until over one year later, on March 9, 1973, the plaintiffs failed to present comments, make objections or even to ask questions concerning the permit application. Rather, after the permit was issued, the plaintiffs waited until over nineteen months had passed before they brought this action.

8. Paragraph 68 of plaintiffs' complaint sets forth the following averments and allegations:

> As previously alleged, the St. Tammany Police Jury with the guiding hand of the District Attorney of St. Tammany Parish, began illegal procedures and manuevers [sic] to become the governing authority of Drainage District # 2, and to dyke and drain the area of what is now known as Eden Isles. Drainage District # 2 received no permit for the work performed by them in approximately 1927-1929. And the St. Tammany Parish Police Jury received no permit from the United States Army Corps of Engineers to dyke and drain this land in 1964; and are presently still performing illegal operations on the North Shores of Lake Pontchartrain.

B. *The Delay Was Inexcusable.*

[3] The district court concluded that the plaintiff's delay in bringing this action could not be excused. The Special Master had concluded that Eden Isles was a large and highly visible project which could not have escaped public attention. Construction of the canal complex began in 1969 and continued until March, 1973, during which time the work was performed by six to nine draglines and four to six bulldozers at a time. The site was lighted at night and was plainly visible from two major highways. The Eden Isles development was not only physically visible to the general public, including the plaintiffs, the project was highly publicized. Beginning as early as January or February of 1970 and continuing through September, 1974, Leisure spent over $850,000 for advertising by newspapers, television, radio, brochures, pamphlets, magazines and billboards. The Special Master found that the progress of the work continuously appeared in newspapers, with advertisements and maps showing the exact location of Eden Isles on the northern shore of Lake Pontchartrain, and with offers of tours and promotional campaigns.

Despite the extensive advertising and visibility of Eden Isles, the appellants contend that their delay in bringing this litigation is excusable. They argue that the length of their delay, if any, should not be measured by beginning from the

point in time when the Eden Isles development became visible and publicly known. Even if they knew or should have known of the development, appellants argue, neither the visibility nor the publicity of the project put them on notice of any illegality upon which this litigation might be based. In his explanation of this position during oral argument, counsel for appellants argued that his clients could presume that the responsible public officials would act in accordance with all environmental and other laws applicable to the Eden Isles development. Essentially, appellants argue that their delay in bringing this case is excusable because they were unaware of any illegality in the Eden Isles project until some unspecified date after Leisure began construction. Without indicating when they believe the delay period for determining laches should have begun to run in this case, appellants' brief contains the following statement:

> Appellants do not believe that there was any inexcusable delay or lack of diligence shown on their part. There is no evidence in the record to indicate that Mary Halpin president of SOWL, *was aware that the Eden Isles project was illegal,* one or two years prior to the filing of the lawsuit. The trial counsel for SOWL indicated in his deposition that he had only uncovered information leading to further investigation within the year prior to the filing of the lawsuit. (emphasis added).

[4] Until they received an indication to the contrary, appellants were entitled to presume that the public officials responsible for approving the Eden Isles project would act in accordance with the law. *Clark v. Volpe, supra; Environmental Defense Fund v. TVA,* 468 F.2d 1164, 1182 (6th Cir. 1972). The appellants, however, were on notice that construction of the Eden Isles development was well underway even before public notice[9] of Leisure's permit application was issued on February 25, 1972. The appellants, therefore, knew or should have known that the environmental effects of the construction might well occur before the preparation of an environmental impact statement ("EIS") if, indeed, the Corps determined that an environmental analysis would be required.[10]

9. Notice was given by publishing an announcement of the permit application in certain newspapers and by mailing the announcement to a large number of interested parties who requested such notice.

10. The record indicates that developers sometimes begin construction of an interior canal system before seeking a permit pursuant to Section 10 of the Rivers and Harbors Act. The record contains a letter from the District Engineer of the Corps of Engineers which states as follows:

> Under existing policy with respect to "dead-end" canals on upland property, the proponent of canal work which will be connected to navigable waters should submit an application for a permit, including a proposed plan of development, to the applicable Corps District Engineer before commencing any form of excavation work. Where a connection to navigable waters has not yet occurred but the canal construction on the upland *is planned or has already begun,* the District Engineer will, in writing, advise the proponent of *the need for a permit whenever the canal is to be connected to navigable waters,* ask if he intends to connect to the navigable waters, and request the immediate submission of the plans, including any proposed development, and a permit application if a connection is so intended. If it is determined that a permit will be required, the District Engineer will advise the proponent that any work on the upland will be done at the risk that a permit may not be issued because of the effect that the canal may have on the navigable waters and that the existence of partially completed excavation work will not be allowed to weigh favorably

Nonetheless, although appellants could have filed suit attempting to enjoin further construction until such time as an EIS was prepared and the permit was issued, appellants did not file their suit until over two and one-half years later. Given the visibility and publicity of the Eden Isles development, as well as the public notice of Leisure's permit application, we conclude that the plaintiffs' delay in bringing this litigation was inexcusable.

C. *Prejudice to the Defendants.*

[5, 6] The mere lapse of time does not constitute laches. *Natural Resources Defense Council v. Grant*, 341 F.Supp. 356 (E.D.N.C.1972); *Pennsylvania Environmental Defense Council v. Bartlett*, 315 F.Supp. 238 (M.D.Pa.1970), *affd.* 454 F.2d 613 (3d Cir. 1971). Even an inexcusable delay does not indicate the presence of the third factor required for a defense of laches—undue prejudice to the party against whom the claim is asserted. In assessing the degree of prejudice to the defendants in this case, we are required to balance the equities, considering both the expenditures which have been made by the defendants and the environmental benefits which might result if the plaintiffs are allowed to proceed with this litigation.

The district court found that the defendants had expended over $26,000,000 on the Eden Isles project before the trial of this action. Moreover, large portions of the project had been substantially completed by that time. This case, therefore, is distinguishable from the cases in which the amounts expended were large in absolute terms but represented a relatively small percentage of the total expenditures anticipated.[11] In view of the substantial sums expended and the extent of construction which has been completed on the Eden Isles project, we conclude that preparation of an EIS at this point would produce very little, if any, environmental benefit. This conclusion is also compelled by the testimony of one of SOWL's own witnesses, who concluded that the Eden Isles development would have a minimal environmental impact on the MPCB ecosystem.

[7] In light of the plaintiffs' delay in bringing this action, therefore, we conclude that the requested postponement of further construction on this substantially completed project, pending preparation of an EIS, would unduly prejudice the defendants. In so holding, we note that the district court's opinion applies only to the "substantially complete developments outlined in the Special Master's reports" and we concur with the court's conclusion that "any further work that might be contemplated by de-

in evaluation of the permit application. (emphasis added).

11. In *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 1975), the defendants had spent $1,000,000 to acquire rights of way for a project which the plaintiffs alleged would cost approximately $667,000,000. The court concluded that laches did not apply because the defendants had not "established prejudice beyond a genuine question to the accomplishment of their statutorily charged duties." Similarly, in *Inman Park Restoration v. Urban Mass Transp. Admin.*, 414 F.Supp. 99 (N.D.Ga. 1976), the court stated:

> Although, a great amount of money, time and effort has already been expended, when compared to the total amount to be spent on the MARTA project it represents only a small percentage. Further, since no actual physical construction has commenced on the segments now under dispute, there may still be great environmental benefits to be derived from the litigation of the present actions.

fendants or third parties at either development is unaffected by this opinion, and would, of course, proceed in accordance with all applicable laws and would be subject to review in the courts."

AFFIRMED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

EDWARD W. WADSWORTH OFFICE OF THE CLERK

CLERK MAY 16, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-1750 - Save Our Wetlands, Inc. (SOWL), ET AL. v. U. S. Army Corps of Engineers, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of

the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

BY: _____
Deputy Clerk

/smg

cc: Mr. Plauche F. Villere, Jr.
Mr. Luke Fontana
Mr. John Schupp
Mr. Patrick J. Berrigan
Mr. Stephen A. Duczer
Mr. Charles Reasonover
Mr. Robert L. Klarquist

No. 76-1864

In the Supreme Court of the United States

OCTOBER TERM, 1977

SAVE OUR WETLANDS, INC., ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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JAMES W. MOORMAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1864

SAVE OUR WETLANDS, INC., ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 78a-96a)[1] is reported at 549 F. 2d 1021. The orders of the district court dismissing petitioners' complaint for permanent injunctive and declaratory relief (Pet. App. 59a-77a) are unreported. The Special Master's report and recommendation (Pet. App. 1a-30a) and first supplemental Special Master's report and recommendations (Pet. App. 31a-58a) are unreported.

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[1]Petitioners did not paginate their appendix. In order to refer to specific portions of the appendix, we have designated the pages after Pet. 18 as 1a through 98a.

JURISDICTION

The judgment of the court of appeals (omitted from petitioners' appendix) was entered on April 4, 1977. A timely petition for rehearing and a petition for rehearing *en banc* were denied on May 16, 1977 (Pet. App. 97a-98a). The petition for a writ of certiorari was filed on June 24, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' complaint, which sought declaratory and injunctive relief concerning a substantially complete real estate development, was properly dismissed on the ground of laches.[2]

STATEMENT

Petitioners seek review of a decision by the court of appeals holding that the district court properly dismissed their complaint for declaratory and injunctive relief on the ground of laches. The relevant facts are set forth in the opinion of the court of appeals and may be summarized as follows:

[2]The second question presented in the petition (Pet. 3) refers to "admitted violations of Federal Criminal laws [that] have been committed by those invoking the doctrine of laches." Although this point is not developed in the body of the petition, the petition (Pet. 4) does allege that the area was drained in the 1920's and 1960's "in violation of a federal criminal statute, The Refuse Act of 1899, 33 U.S.C. Section 407 * * *." Section 407 declares that it is unlawful to throw, discharge, or deposit refuse matter in navigable waters without a permit. In our view the question whether the original drainage of this area in the 1920's and redrainage in the 1960's by the local government (the St. Tammany Parish Police Jury) was illegal has little relevance to the question presented in this case, which is whether the Eden Isles development should be enjoined pending preparation of an environmental impact statement pursuant to the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.* In fact, NEPA had not yet been enacted when the alleged violations occurred, and there is no suggestion that the development of Eden Isles was in any way involved in the "violations."

Petitioners initiated this action on October 29, 1974, by filing a 49-page complaint alleging numerous grievances against 37 individuals, corporations, and governmental agencies[3] who, petitioners alleged, were partially responsible for causing environmental degradation of Lakes Maurepas, Pontchartrain, Catherine and Borgne, four interconnected bodies of water located in southern Louisiana (Pet. App. 81a-82a). Petitioners' most specific allegation was that the United States Army Corps of Engineers had violated the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, by issuing a permit pursuant to Section 10 of the Rivers and Harbors Act, 30 Stat. 1151, 33 U.S.C. 403, to co-defendant Leisure, Inc. (Leisure), for the dredging of an entrance channel from Lake Pontchartrain to an interior canal system in Eden Isles, a real estate development on the north shore of the lake (Pet. App. 82a).

All of the Eden Isles property is located on reclaimed land[4] in St. Tammany Parish Drainage District No. 2 (Pet. App. 84a). It is divided into two adjacent parcels known as Eden Isles East and Eden Isles West. Leisure

[3]The federal defendants named in the complaint were the United States Army Corps of Engineers, the Environmental Protection Agency, the Department of Housing and Urban Development, and various officers of these agencies (Pet. App. 81a).

[4]The area was originally drained in the 1920's but reflooded in the 1930's when the levees were allowed to deteriorate. The area was again reclaimed between 1962 and 1966, at a cost of almost $2 million, by the St. Tammany Parish Police Jury, a local governmental body (Pet. App. 84a-85a).

acquired the Eden Isles property in January 1969 and began constructing a residential development on Eden Isles West. The development includes a perimeter and interior canal system that will give Eden Isles homeowners water access to Lake Pontchartrain (Pet. App. 85a-86a).

In October 1971 Leisure submitted to the Corps an application under Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403, for a permit to dredge an entrance channel from Lake Pontchartrain to the portal of its canal system (Pet. App. 86a). A revised application was submitted on February 21, 1972. On February 25, 1972, the Corps issued public notice of the permit application (*ibid.*). Subsequently, on March 9, 1973, the Corps, with the concurrence of the Department of the Interior, issued the Section 10 permit to Leisure (Pet. App. 87a). No environmental impact statement concerning the permit was prepared or filed pursuant to the National Environmental Policy Act (*ibid.*).

Petitioners did not file their complaint until October 29, 1974, more than 19 months after the Corps had issued the permit to Leisure (Pet. App. 89a). The district court, upon stipulation, referred the action for trial to a Special Master pursuant to Rule 53, Fed. R. Civ. P. (Pet. App. 82a-83a). On December 19, 1974, the Special Master entered his first report, which recommended that the motion for a preliminary injunction be denied (Pet. App. 29a-30a). After a further hearing, the Special Master submitted a supplemental report recommending that the complaint be dismissed as barred by laches (Pet. App. 57a-58a). Thereafter, the district court, after a hearing on petitioners' objections and their motion for a new trial, overruled petitioners' objections to the master's reports and dismissed the action on the basis of laches (Pet. App. 66a-72a). The court of appeals affirmed (Pet. App. 78a-96a).

ARGUMENT

The decision of the court of appeals, on whose opinion (Pet. App. 78a-96a) we principally rely, is correct and presents no issue of general importance warranting review in this Court.

1. There is no conflict with any decision of this Court, or among the circuits, regarding the applicability of equity doctrines, including laches, to environmental litigation. Indeed, in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 407-408, this Court ruled that "in simple equitable terms, there were no grounds for the injunction: the District Court's finding of irreparable injury to the intervenors and to the public still stood, and there were—on the Court of Appeals' own terms—no contervailing equities." When the facts warranted a finding of laches in an action brought pursuant to the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, injunctive relief has been denied. See, *e.g.*, *Shiffler* v. *Schlesinger*, 548 F. 2d 96, 103-104 (C.A. 3); cf. *Ohio* v. *Callaway*, 497 F. 2d 1235 (C.A. 6) (general equity principles applicable in NEPA actions).

The cases petitioners cite (Pet. 13-16) are simply situations where courts held that the particular facts did not warrant a finding of laches. For example, the Fourth Circuit, in *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1329, certiorari denied, 409 U.S. 1000, declined to invoke laches "because of the public interest," specifying, "[w]e believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public" (emphasis by the court). The Fifth Circuit has expressly recognized the Fourth Circuit's articula-

tion and applied it in rejecting laches as a bar, in *Ecology Center of Louisiana, Inc.* v. *Coleman*, 515 F. 2d 860, 868.

We now show the support in this case for the court of appeals' recognition of NEPA goals and its conclusion that this suit was barred by laches.

2. The facts of this case demonstrate that the finding of laches was amply warranted. Although petitioners describe the area in question as a "vast but delicate wetlands estuary abundant with all forms of fish fowl and animal life" (Pet. 3), as the court of appeals observed, the construction of dikes, levees, and dams began in 1927, and the area has been dry land—except for a four-week period—since 1966 (Pet. App. 90a). Thus the construction that most drastically altered the area was undertaken "many years" before this suit was filed (*ibid.*).

Construction began on Eden Isles in 1969. The development was conspicuously and heavily advertised—at a cost in excess of $850,000 (Pet. App. 91a)—and the Corps of Engineers issued public notice of Leisure's permit application to numerous individuals, agencies, and the news media (Pet. App. 49a, 86a-87a). Petitioners nevertheless failed to lodge any objection to the permit application, and did not bring this action until more than 19 months after the permit issued. Moreover, they have offered no valid excuse for their delay.

By December of 1974, shortly after this suit was filed, major portions of the development were already 99 percent complete (Pet. App. 88a). Leisure has now spent more than $26 million to develop the project (Pet. App. 94a-95a). Moreover, the Special Master found that between 800 and 900 lots and other property with a value in excess of $18 million had been sold to individuals who were not joined in this litigation (Pet. App. 88a). Finally,

the evidence introduced at trial indicated that the Eden Isles development would have only a minimal adverse environmental impact upon Lake Pontchartrain and connecting waters[5] and, as the court of appeals observed, "preparation of an [environmental impact statement] at this point would produce very little, if any, environmental benefit" (Pet. App. 95a).

In summary, petitioners substantially delayed in filing this action, the delay was not excusable, and it caused undue prejudice to the defendants with no showing of substantial countervailing equities. The finding of laches was fully warranted.[6]

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[5]The factual findings of the Special Master (Pet. App. 33a-53a) were not challenged on appeal. In their petition (Pet. 11-12, 17), petitioners make extensive reference to an environmental investigation prepared by Burke & Associates. This report was not offered as evidence at trial. As the court of appeals observed (Pet. App. 95a), one of petitioners' own witnesses concluded that the Eden Isles development would have a minimal impact on the ecosystem involved.

[6]It should be noted that both the district court and the court of appeals carefully limited the decision to "substantially complete" elements of the development and recognized that any further work must be in compliance with all applicable laws and would be subject to judicial review (Pet. App. 64a, 95a-96a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

DOJ-1977-09

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1864

SAVE OUR WETLANDS, INC. (SOWL) BY MARY HALPIN, PRESIDENT AND FRANCOIS JELALIAN,
Petitioners,

versus

UNITED STATES ARMY CORPS OF ENGINEERS, AND ITS OFFICERS AND EMPLOYEES, THE ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, LEISURE, INC., THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT THROUGH THEIR NAMED ADMINISTRATORS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPPOSITION BRIEF ON BEHALF OF ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, AND LEISURE, INC.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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OPPOSITION BRIEF ON BEHALF OF ST. TAMMANY PARISH POLICE JURY AND INDIVIDUAL NAMED MEMBERS AND EMPLOYEES, AND LEISURE, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 549 F2d 1021. The Orders of the district court dismissing petitioners' complaint are unreported, but these Orders and the Special Master's Reports are included as appendices to the Petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 USC 1254(1).

RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether, based on the applicable facts, the Court of Appeals correctly held that petitioners' suit to enjoin further work at a "substantially complete" real estate development was barred by the doctrine of laches.

RESPONDENTS' STATEMENT OF THE CASE

The Court of Appeals found that the "plaintiffs' principal allegation concerned the validity of certain permits issued to Leisure . . . by the United States Army Corps of Engineers . . . Plaintiffs alleged that the Corps had violated the National Environmental Policy Act . . . and various other federal statutes, by issuing the permits pursuant to Section 10 of the Rivers and Harbors Appropriation Act . . ." (549 F2d at 1023)

In petitioning this Court, Petitioners seek to require the preparation of an environmental impact statement with respect to the work performed several years ago pursuant to duly issued permits.

The Eden Isles development, which the complaint challenged, was actually begun in approximately 1927, when the area was enclosed with dikes, levied, drained, and a governmental Drainage District established. (549 F2d 1024) In 1962, the Drainage District's governing body began a program to develop the area, at a cost of millions of dollars of public money. (549 F2d at 1024)

In 1969, Leisure, Inc. acquired the property, and between 1969 and the trial of the case in 1974, Leisure spent over $26,000,000 on development. Throughout the entire period, work progressed without objection from anyone, and pursuant to a permit issued by the United States Army Corps of Engineers. (549 F2d 1028-29)

The Court of Appeals held that Petitioners' complaint was barred by laches, finding that Petitioners were guilty of unreasonable delay, that the delay was inexcusable, that the project was "substantially complete", and that postponement of further development would unduly prejudice the local governmental district and the developer, Leisure. (549 F2d at 1029)

Plaintiffs are now seeking review of the unanimous decision of the Court of Appeals which affirmed the District Court, which adopted the Report of the Special Master (Magistrate Morey Sear, who was shortly thereafter appointed to the bench for the Eastern District of Louisiana). Five Federal judges have now rejected Petitioners' contentions, without dissent, in several lengthy, and well-reasoned opinions.

RESPONDENTS' RESPONSE TO PETITIONERS' STATEMENT OF QUESTIONS PRESENTED

1 — *Response to Petitioners' First "Question Presented"*

In their first "Question Presented", Petitioners argue that certiorari should be granted to determine whether a *claim* that an environmental impact statement is needed can be barred by laches, in an environmental case.

The Court of Appeals rejected Petitioners' argument, stating:

> "The district court found that the defendants had expended over $26,000,000 on the Eden Isles project before the trial of this action. Moreover, large portions of the project had been substantially completed by that time. This case, therefore, is distinguishable from the cases in which the amounts expended were large in absolute terms but represented a relatively small percentage of the total expenditures anticipated. In view of the substantial sums expended and the extent of construction which has been completed on the Eden Isles project, we conclude that preparation of an EIS at this point would produce very little, if any, environmental benefit. This conclusion is also compelled by the testimony of one of SOWL's own witnesses, who concluded that the Eden Isles development would have a minimal environmental impact on the MPCB ecosystem."

> "In light of the plaintiffs' delay in bringing this action, therefore, we conclude that the requested postponement of further construction on this substantially completed project, pending preparation of an EIS, would unduly prejudice the defendants." (549 F2d 1028-29)

The holding of the Court of Appeals is in accord with the basic rationale for requiring an environmental impact statement, under the National Environmental Policy Act (42 USC 4321 *et seq.*). An EIS is prepared to determine ecological impact *before* the project is authorized and *before* an area is affected. *Clark vs Volpe*, 342 F.Supp. 1324, 1330 (ED La.-1972), aff'd 461 F2d 1266 (CA 5-1972).

As the Court of Appeals in this case stated: "It is now settled that the equitable doctrine of laches can apply in the context of environmental litigation. *Ecology Center vs Coleman*, 515 F2d 860, 867 (5th Cir.-1975); *Clark vs Volpe*, 342 F.Supp. 1324 (ED La.-1972), aff'd. 461 F2d 1266 (CA 5-1972)." (549 F2d 1026) The Fifth Circuit's position is consistent with the holdings of the other circuits. *Steubing vs Brinegar*, 511 F2d 489, at 494 (CA 2-1975); *Pennsylvania Environmental Council vs Bartlett*, 315 F.Supp. 238 at 246 (MD Pa.-1970), *aff'd* 454 F2d 613 (CA 3-1971); *Environmental Defense Fund vs Tennessee Valley Authority*, 468 F2d 1164, at 1182 (CA 6-1972); *Lathan vs Volpe*, 455 F2d 1111, at 1122 (CA 9-1972).

Not only is the basis for the Court of Appeals' decision in this case correct, but the factual and legal arguments urged by Petitioners are groundless. In support of their argument that an EIS is required at

this late date, Petitioners, who have never challenged any of the facts found by the lower courts, urge consideration by this Court of several factual matters which are not supported in the record. Although petitioners contend that the development will have adverse environmental effects, the Court of Appeals, District Court, and Special Master all found that the development would have "minimal environmental impact", based on testimony of petitioners' own witnesses. (594 F2d 1029)

To support Petitioners' factual contention that the development will have an adverse environmental impact, petitioners rely on a so-called environmental investigation by Burke & Associates which does not appear in the record in these proceedings. In fact, it was specifically excluded from the record by an Order of the Fifth Circuit dated October 6, 1975.

Petitioners attempt to equate future development, and the need for an environmental impact statement, to the further construction of private homes by individuals who are not even parties to this litigation. In support of Petitioners' contention that "only fifty houses had been built" (Petition, page 12), Petitioners cite the extent of development at the time of trial, almost three years ago. However, the development has progressed continuously since the project was started, and actual development far exceeds the obsolete facts relied upon by Petitioners.

Moreover, although Petitioner's 49-page complaint challenged virtually all work at the project, construction of additional homes was not a matter about which

petitioners complained.* Petitioners no doubt omitted the construction of private homes from their complaint because no permit is required for such construction, and accordingly the question of an EIS is not even involved. As the Court of Appeals noted, all of the matters about which petitioners did in fact complain, have been "substantially completed" for several years now.

2 — *Response to Petitioners' Second "Question Presented"*

Petitioners' statement of the second question presented reads:

> "Whether the application of laches is appropriate where admitted violations of federal criminal laws have been committed by those invoking the doctrine of laches."

Nowhere during proceedings before the lower courts was this issue even suggested. There was no "admitted" violation, nor was there any suggestion in this civil proceeding that a *crime* had been "committed". Thus, petitioners' second "Question Presented" attempts to seek review of an issue not even presented to, or properly before, the lower courts.

As the Special Master noted in his First Supplemental Report dated January 10, 1975, the issue of laches was severed, by agreement of the parties, and tried

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* Ironically, Petitioners apparently contend they are trying to protect individuals who have not yet built their homes at Eden Isles, but the Eden Isles Property Owners Association actually intervened in this suit on the side of the developer, in opposition to Petitioners.

separately. The District Court, in its order dated January 27, 1975, adopting the Report of the Special Master noted: "The matter did not reach trial on the merits, and accordingly the Special Master made no findings or conclusions as to whether the projects required or had been developed with federal permits, environmental statements, or in accordance with applicable federal law."

For the purpose of considering whether Petitioners' claims were barred by laches, the Court of Appeals reached its conclusion, based on the assumption that the challenged work might *arguably* require other federal permits or an environmental impact statement.

There was never any question before the District Court or the Court of Appeals of the commission of a crime. In fact, at no time during proceedings below was there ever any admission, or finding, of improper conduct in any respect. To the contrary, the lower courts merely considered whether Petitioners' complaint was barred by laches, assuming that further federal authorization might arguably be involved.

RESPONDENTS' RESPONSE TO PETITIONERS' SECTION ENTITLED "CONFLICT OF CIRCUITS"

Petitioners cite four cases, which, Petitioners contend, conflict with the Fifth Circuit's decision in this matter. However, rather than conflicting with the Appeals Court's decision in this case, the cases cited by Petitioners actually apply the doctrine of laches, and are easily reconciled with the holding of the Court of Appeals in this case.

In *Environmental Defense Fund vs Tennessee Valley Authority*, 468 F2d 1164 (CA 6-1972), cited by Petitioners, the court was concerned with "segmented analysis" of environmental impact with respect to an "on-going" or continuing federal project which was only partially completed. The court concluded that "the only significant 'stage' of construction is that which directly causes the significant environmental effects anticipated by the project planners". (at 1180).

Instead of rejecting the doctrine of laches, the court actually considered laches and concluded that there had been no unreasonable delay in bringing suit. (at 1182). The court felt that an EIS could still provide useful information *before* the significant stage of construction had been completed. In the case now before this Court, the entire project is "substantially complete", and all of the work which arguably required a federal permit (and, accordingly, perhaps an EIS) was completed years ago.

Petitioners next cite *Arlington Coalition on Transportation vs Volpe*, 458 F2d 1323 (CA 4-1972), cert. den. 409 US 1000 (1972), in which the court ordered an environmental analysis, because the project had not progressed to the point where the cost of altering or abandoning the proposed route would certainly outweigh the benefits which might accrue to the general public. The court said that it could not define the point of completion beyond which an EIS was no longer required, noting, however, that that point had not yet been reached, as "actual construction on the highway itself has not begun." (at 1332) Accordingly, the *Arlington* case is wholly inapplicable to the Eden Isles development, which the Court of Appeals analyzed in great detail and concluded was a "substantially completed project".

The third case cited by Petitioners is *I-291 Why? Association vs Burns*, 517 F2d 1077 (CA 2-1975), a per curiam affirmance of a district court decision, in which the appeals court actually considered the doctrine of laches but concluded that it did not bar suit, noting the absence of progress during the alleged delay. In effect, the court concluded that there was no prejudice to the defendant, an essential element in the application of laches.

The fourth case cited by Petitioners is *Steubing vs Brinegar*, 511 F2d 489 (CA 2-1975). At the time of trial, the bridge involved in that action was only 3% complete. The court found that plaintiff had not delayed unreasonably in filing suit, and that "the project was still at a stage where substantial environmental savings might result from preparation of an EIS". (at 494) As the Court of Appeals noted throughout its opinion in the case before this court, the Eden Isles project was "substantially complete by late 1974". (549 F2d 1026, 1028, 1029)

Contrary to Petitioners' contention that the four cases discussed above rejected laches, those cases actually examined the facts before those courts, and concluded, based on those facts, that laches was not applicable to bar plaintiffs' claims. There appears to be no holding that supports Petitioners' argument that laches, when otherwise applicable, becomes inapplicable solely because an environmental issue is involved.

CONCLUSION

Petitioners are requesting that an EIS be prepared with respect to the continuation of construction of private homes at a "substantially completed"

development. An EIS is not even required for such work; and with respect to the work which was challenged in proceedings below, Petitioners' claims are barred by laches, based on the facts before the Court of Appeals. Moreover, the Court of Appeals concluded that "the preparation of an EIS at this point would produce very little, if any, environmental benefit . . . [based on] the testimony of one of SOWL's own witnesses". (549 F2d 1029)

The Fifth Circuit's decision in this case is consistent with the application of the doctrine of laches by other Circuits.

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

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